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AUTOMOBILE BONDING COMPANY,
Appellant,

vs.

EDD C. SHAIN,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

266 I.A. 595

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against C. Ponstein, doing business as Ponstein Garage, and John Doe, to recover possession of a Chrysler automobile. The automobile was taken on a writ and delivered to the plaintiff. Edd C. Shain entered his appearance and claimed that he was sued as John Doe. Ponstein was defaulted and there was a jury trial resulting in a verdict and judgment in favor of the defendant, Shain. His damages were assessed at one cent and a writ of retorno was awarded and plaintiff appeals.

The record discloses that defendant owned a Chevrolet automobile and was desirous of buying a Chrysler automobile from W. G. Maurer Auto Company of Freeport, Illinois. On July 27, 1929, a conditional sales contract was entered into between the parties whereby the Maurer Auto Co. sold the defendant a Chrysler automobile for $1276.61, allowing the defendant a credit of $435 for the Chevrolet, and at the time defendant paid $20 cash, leaving a balance due of $821.61. This was payable in 18 monthly installments of about $45 each. Shain was unable to pay the Maurer Auto Co., and he applied to plaintiff automobile bonding company of Chicago for sufficient money to enable him to consummate the transaction, and on the same day executed his note for the $821.61, payable in 18 monthly installments of $45 each. Plaintiff bought the note and conditional sales contract from the Maurer Auto Co., paying therefor $683. The Chrysler was delivered to the de-

Plaintiff brought an action of replevin against C. Manstein, having purchased an interest therein, and upon bond, to recover possession of a daimler automobile. The automobile was taken on a writ and delivered to the plaintiff. Ida B. Smith entered his appearance and claimed that he was owed an \$80 commission for delivering said Daimler to one Ida Mae Cox. Manstein was defaulted at the first term resulting in a verdict and judgment in favor of the defendant, Smith. The exceptions were sustained at the next term of court and plaintiff appealed.

The record discloses that defendant owned a Daimler automobile and was desirous of buying a Chrysler automobile from W. G. Motor Sales Company of Trenton, Illinois. On July 27, 1928, a conditional sales contract was entered into between the parties whereby the Daimler was to be delivered to plaintiff for \$1276.00, allowing the defendant a credit of \$338 for the Daimler, and it was also stipulated that defendant, having a balance due of \$963.00. This was payable in 18 monthly instalments of about \$49 each. Smith was unable to pay the Motor Co., and he applied to plaintiff auto-title trading company of Trenton, and on the same day executed his note for the indebtedness, and delivered said Daimler to the defendant in the transaction, and on the same day executed his note for the \$963.00, payable in 18 monthly instalments of \$49 each. Plaintiff, having knowledge of the fact that the Daimler was delivered to the defendant by the Motor Co., and that the defendant had executed his note for the purchase price, and that the Motor Co. had assigned said note to plaintiff, brought this action of replevin against C. Manstein, having purchased an interest therein, and upon bond, to recover possession of a Daimler automobile. The automobile was taken on a writ and delivered to the plaintiff. Ida B. Smith entered his appearance and claimed that he was owed an \$80 commission for delivering said Daimler to one Ida Mae Cox. Manstein was defaulted at the first term resulting in a verdict and judgment in favor of the defendant, Smith. The exceptions were sustained at the next term of court and plaintiff appealed.

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fendant and he made payments from time to time but few of them were made when due. The total amount paid by plaintiff was $228.21. Not having paid the January, 1930, installment, a collector called on him and his testimony is to the effect that he demanded the January installment and $15 fees for collection charges; that defendant was unable to make the payment; that the defendant told him he kept the Chrysler automobile at a garage and that the collector called at the garage and found that defendant owed the garage $102.15 for keeping the car and furnishing gasoline and $85 for repairs on the automobile on account of damages done to it.

February 13, 1930, plaintiff instituted the replevin suit.

The testimony of the defendant was to the effect that the Maurer Auto Co., in making the deal, agreed to allow him $550 for his Chevrolet, practically $100 more than he was given credit for in the conditional sales contract; that he sent a night watchman who worked at the same place at which the defendant was doing some work, with the January installment, to plaintiff's place of business and that the night watchman tendered the amount due, approximately $45; that the young lady in charge refused to accept the money because she did not know the man making the tender and said that Shain should have produced his book. The watchman corroborated the defendant and testified that defendant had given him the money and that he had gone to plaintiff's place of business and they refused to accept the money for the reason above stated. Plaintiff offered evidence to the effect that no such tender had been made. The defendant further testified that when the collector called on him for the January installment he tendered the amount of the installment, which the collector refused to accept, demanding $20 additional as a collection charge; that defendant was about to get the $20 when it was agreed that defendant need not do so at that time but that defendant would mail the money to the plaintiff within a day or two.

No money was afterwards paid plaintiff.

As stated, the suit was brought February 13, 1930, but was not tried until October 30, 1931. The last of the 18 monthly installments due under the note and contract would become due January, 1931, so that all of the installments were long overdue at the time of the trial.

The defendant also gave testimony to the effect that at the time he signed the conditional sales contract he called attention to the fact that there should have been an additional $100 allowed him for the Chevrolet automobile; that plaintiff's representative said the matter would be corrected later but could not be done then because the matter must be closed at once.

We think the verdict and judgment is contrary to the evidence and contrary to the law. Sec. 22 of the Replevin act, chap. 119, provides that if the plaintiff in an action of replevin is not entitled to the possession of the property judgment should be given for the return of the property to the defendant and damages for the use of it from the time it was taken until its return "unless the plaintiff shall, in the meantime, have become entitled to possession of the property, when judgment may be given against him for costs and such damages as the defendant shall have sustained."

All the evidence shows that at the time of the trial there were 13 installments due and unpaid and therefore defendant was not entitled to have a writ of retorno habendo awarded. Comm. Credit Trust v. Beck, 261 Ill. App. 436; Chase Bros. Piano Co. v. Conners, 182 Ill. App. 418; Kissel Motor Co. v. Docauer, 198 Ill. App. 43.

In the Beck case, which was a replevin suit involving an automobile, the court, after referring to sec. 22 of the Replevin act, said (p. 440): "Appellant (plaintiff) offered to prove that appellee never made any payments on the note and that at the time of the trial, July 22, 1930, there were 11 installments due and

of the extent. Only 22, later, there were 11 instruments due and
outstanding under the note and mortgage which became due
January, 1931, so that all of the instruments were long overdue
at the time of the trial.

The defendant also gave testimony to the effect that at
the time he signed the conditional sales contract he relied upon
plaintiff's representation to the effect that there would be
allowed him for the Overland automobile; that plaintiff's repre-
sentative said the matter would be understood later and would not
be done then because the matter must be closed at once.

To which the verdict and judgment is contrary to the evi-
dence and contrary to the law. Sec. 85 of the Negotiable Ins.
Law, providing that if the plaintiff is an action by remedy is
not entitled to the possession at the property judgment shall be
given for the return of the property to the defendant and damages
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ingly for costs and such damages as the defendant shall have sustained.'

All the evidence shows that at the time of the trial there
were 13 instruments due and unpaid and therefore defendant was not
entitled to have a writ of replevin issued. Chase, Orrell
Trust v. Yeck, 201 Ill. App. 438; Bauer Bros. Piano Co. v. Spencer,
198 Ill. App. 418; Kinsel Motor Co. v. Donnell, 198 Ill. App. 42.

In the Orrell case, which was a replevin suit involving an
automobile, the court, after referring to sec. 85 of the Negotiable
Inst. Law (p. 440): "Appellant (plaintiff) alleges in para graph four
of the writ, duly sworn, that there were 11 instruments due and
unpaid under said paragraph on the note and that at the time

unpaid thereon. Under the section of the statute above quoted (sec. 22) it was error for the trial court not to admit this evidence and find the rights of the property in appellee as appellant had a clear right to the possession of the car because of the default in the payment under the contract and note."

And in the Conners case (182 Ill. App. 418) it was said (p. 423): "At the time of the trial the entire debt for which the mortgage was given had matured and was wholly unpaid, except for the sum of $22, which had become due from defendant in error to plaintiff in error for commissions earned in another transaction,*** Defendant in error was, therefore, at the time of the trial, entitled to the possession of the mortgaged property by the terms of the mortgage. Upon the record as here presented the judgment of the Superior court should have been against defendant in error for costs, but without an order for the return of the property."

So, in the instant case, if plaintiff was not entitled to possession of the automobile at the time the suit was brought, the writ of retorno habendo should not have been awarded because 13 of the installments were due and unpaid at the time the case was tried. But we are also of the opinion that under the terms of the conditional sales contract, plaintiff was entitled to possession of the car at the time the suit was brought. The contract provided that the title of the property should remain in the seller or his assignee until the whole price was paid. The undisputed evidence is that the defendant was in default in the payment of the January installment. We think little credence can be given the testimony offered by defendant to the effect that he had twice tendered the payment of this installment. Nor do we think the defendant is in a position to contend that he should have been given a credit of $100 more on the contract for his Chevrolet automobile. While there is some evidence that

plaintiff's agent, in submitting the contract to defendant for signature, endeavored to conceal the terms of the contract, this evidence we think has little probative force.

We are further of the opinion that the court erred in instructing the jury, at the request of the defendant, in reference to the necessity of plaintiff making a demand for the Chrysler automobile before the suit was brought. The evidence all shows that the defendant, in his pleadings and on the trial, was contending that he was entitled to retain the automobile. He at no time evinced any disposition indicating that he would have surrendered the car in case a demand had been made.

The record shows that a demand would have been unavailing, and in these circumstances no demand is required. Nat. Bond & Investment Co. v. Zakos, 230 Ill. App. 608; Kee & Chapell Dairy Co. v. Penn. Co., 291 Ill. 248; Johnson v. Howe, 2 Gilm. 342; Cranz v. Kroger, 22 Ill. 74; Barnes Scale Co. v. Rose, 257 Ill. App. 92; 34 Cyc. pp.1404-5; 54 Corpus Juris, p. 452, Sec. 75 C-76; Cobbey on Replevin, secs.447, 448, 450 and 451; Thompson v. Thompson, 11 No. Dakota, 208; Wells on Replevin, sec. 373.

In the Zakos case (230 Ill. App. 608) in discussing the question of the necessity of a demand in a replevin action, we said (p. 612): "In an action of replevin or trover, no demand is necessary before bringing suit where the evidence discloses that such a demand would have been unavailing. The object of a demand is to afford the defendant an opportunity to restore the property to the one entitled to possession without being put to the expense and annoyance of litigation. But where it appears that the defendant either before the action was instituted or upon the trial contests the plaintiff's right upon the merits, or where it appears that a demand would have been of no avail, then none is required, for the law never requires the doing of a useless thing." Citing a

number of authorities.

In the Penn. case (291 Ill. 248) the court said (p. 255): "While demand is usually necessary where the defendant comes into possession of the goods rightfully, yet where the circumstances show that demand would be unavailing such demand is not necessary. Crane v. Kroger, 22 Ill. 74; Johnson v. Howe, 2 Gilm. 342."

In 34 Cyc., p. 1404, the question of a demand is discussed and it is held that in certain cases a demand is necessary before suit. And continuing on the next page it is said, "but it also follows that since this is the object of the demand defendant can not object that no demand was made if he subsequently contests the action on the merits, claiming title in himself, or where it otherwise appears that a demand if made would have been unavailing."

And in 54 Corpus Juris, p. 452, sec. 75g, it is said: "No demand is necessary where it appears from the facts and circumstances of the case that a demand if made would have been futile and unavailing, and this fact may appear either from the acts or declarations of defendant in regard to the property before the action is instituted, or from the position taken by him upon the trial, as where he does not rely upon the want of a demand as a technical defense but contests the right of plaintiff upon the merits, claiming a superior right or title in himself." And in a note to this section it is said: "Such a position is inconsistent with any supposition that the property would have been surrendered if a demand therefor had been made." And in sec. 76, following, the author says: "Where in replevin defendant claims title to the property and the right of possession incident thereto, no demand by plaintiff is necessary,*** So if on the trial defendant contests the case on the merits, basing his defense on title in himself and the right of possession incident thereto, or title in a third person, no demand is necessary; nor in such case can defendant defeat the

[illegible]

action on the ground that no demand was in fact made, although the case is one where a demand should have been made, since defendant's position on the trial is inconsistent with any supposition that he would have restored the property if a demand had been made."

In Sec. 447, Cobbey on Replevin, it is stated: "The decisions upon the question when a demand is necessary are neither uniform nor entirely reconcilable." And Sec. 448: "The rule which requires demand is a technical one. The reason of it is that the law presumes that the party in possession of property not his own will respect the rights of the true owner when informed of them, and that upon demand being made he will surrender without suit. But where defendant pleads ownership in himself he cannot defeat a recovery under the pretence that he would have surrendered the property if demand had been made. *** Where the defendant in replevin with the general issue pleads property in himself, it is not necessary to prove demand previous to the suing out of the writ." And Sec. 450: "Where plaintiff's right is contested by defendant on a claim of a superior right, the defendant cannot set up a want of demand as a reason for his failure to surrender. This claim of ownership by defendant is inconsistent with the theory that he might have surrendered them on demand, and removes the necessity for demand if one had been necessary." And Sec. 451: "***If defendant desire to rely upon the omission to make demand, he should show a willingness to surrender upon proper demand made."

We do not want to be understood as approving of all the things done by plaintiff in this case, such as suing the defendant, Shain, as John Doe. Plaintiff knew Shain's name and he should have been sued in his right name. There are other matters of a similar character which we do not mention here because they are not of controlling importance.

The verdict and judgment being against the manifest weight of the evidence and against the law, the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J., concurs.

Matchett, J., dissents. See next page.

The verdict and judgment stand against the appellant on both
of the evidence and against the law, and judgment of the Superior
Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

Mankell, J., concurs.

Bridges, J., dissents. See dissenting opinion.

35723 MR. JUSTICE MATCHETT DISSENTING.

I enter my dissent from the judgment of the court. I think in an action such as the evidence here discloses proof of a demand for possession, or equivalent proof of detention, is a condition precedent, and that without such proof plaintiff failed to disclose a cause of action. While language to the contrary appears in some of the opinions of the Appellate court, I do not understand that the Supreme court of this State has ever departed from the rule announced in Hamilton v. Singer Mfg. Co., 54 Ill. 370. In Keller v. Robinson Co., 153 Ill. 458, the briefs which are printed as a preface to the opinion show that this question received thorough consideration. The court there said:

"The stipulation of parties shows that a demand in this case was made after the suit was begun and the writ issued, but not before, and that the demand made was refused. That such a demand and refusal did not prove a wrongful detention at the time of bringing the suit is admitted. It is said, however, that the fact that the defendant refused to surrender the property after the writ was issued is evidence tending to prove that a demand before the suit was brought would have been unavailing. This position we regard as untenable. The defendant had a perfect right to rely upon the defense that no proper demand of him had been made. When he refused to release his levy he had that complete defense to the action. To say that his refusal, then, is evidence that he would have done so before the suit was brought if he had been put to his election to give up the property or take the risk of litigation on the right of property alone, is, we think, illogical, and if established as a rule of law would practically dispense with a demand before suit in every case."

That opinion cites Johnson v. Howe, 2 Gilm. 342, as an example of a waiver of demand where the proof showed that defendants had given express orders to their servants not to deliver the property (a horse and bridle) to the plaintiff owner. It was held that this proof tended to show a detention of the property and the court said a demand and refusal was not the only evidence tending to establish such a fact. To the same effect is Cranz v. Kroger, 22 Ill. 74, where an instruction that plaintiff was not entitled to recover unless "he proves a legal demand of the defendant ** or circumstances showing an unlawful detention," was held proper.

I enter my dissent from the judgment of the court. I think in an action such as this evidence here disclosed proof of a demand for possession, or equivalent proof of detention, is a condition precedent, and that without such proof plaintiff failed to disclose a cause of action. While language in the majority opinion to some of the opinions of the appellate court, I do not understand that the Supreme Court of this State has ever departed from the rule announced in Hamilton v. Glover etc. Co., 84 Ill. 199. In Keller v. Hopkins Co., 183 Ill. 488, the trial court directed as a proposition of law that this question received thereupon consideration. The court there said:

"The stipulation of parties seems that a demand in this case was made after the suit was begun and the writ issued, but not before, and that the demand made was refused. That such a demand and refusal did not prove a wrongful detention at the time of bringing the suit is admitted. It is said, however, that the fact that the defendant refused to surrender the property after the writ was issued is evidence tending to prove that a demand before the suit was brought would have been unavailing. While position on regard as untenable. The defendant had a perfect right to rely upon the defense that no proper demand of him had been made. That he refused to release his levy he had that conclusive defense to the action. To say that his refusal, then, is evidence that he would have done so before the suit was brought if he had been put to his election is give up the property at once, like Ilsteman, and if retained as a property alone, is, we think, illogical, and if retained as a tule of law would practically dispense with a demand before suit in every case."

That opinion cites Johnson v. Dane, 2 Ohio, 343, as an example of a waiver of demand where the proof showed that defendants had given express orders to their servants not to deliver the property (a horse and bridle) to the plaintiff owner. It was held that this proof tended to show a detention of the property and the court said a demand and refusal was not the only evidence tending to establish a fact. To the same effect is Cowan v. Hyatt, 24 Ill. 74, quoting an instruction that plaintiff was not entitled to recover unless "he proves a legal demand of the defendant" or circumstances

In Kee & Chapell Co. v. Pennsylvania Co., 291 Ill. 248, a dairy company brought a replevin suit to recover milk bottles delivered by certain junk dealers to defendant, a common carrier. There was evidence tending to show that the bottles had the name of the dairy company marked on them and that the original taking of the property by the party from whom defendant received them was wrongful. In such case, of course, there was no necessity of proof of demand in order to show detention. There was, however, some evidence of a demand, and the opinion of the Supreme court states that even if demand as made was insufficient, it was sufficient to show that a demand, if one had been made, would have been unavailing, and cites Johnson v. Howe, 2 Gilm. 342, and Cranz v. Kroger, 22 Ill. 74.

Such a case (easily distinguishable from the instant one) should certainly not be construed as overruling well considered cases or as authority for the proposition now urged that if a defendant defends on the merits he is precluded from insisting on the necessity of a demand by the plaintiff where the defendant holds possession under a conditional sales contract.

I do not understand that such a rule has ever been approved by the Supreme court of this State. That it is against the weight of the authority, see the annotation to Lundberg v. Switzer, 146 Wash. 416; 263 Penn. 178; 59 A.L.R. 131-134, where the authorities are collected, and also the note to Sinnott v. Feiock, 165 N. Y. 444, 59 N. E. 265; 80 A.S.R. 753. I am constrained to state this dissent because I am persuaded that such a rule, as stated in the majority opinion, may easily be used for purposes of oppression in this class of cases.

In Kan & Cassell Co. v. Commercial Co., 181 III. 366, a dairy company brought a replevin suit to recover milk bottles delivered by certain truck venders to defendant, a common carrier. There was evidence tending to show that the bottles had the name of the dairy company marked on them and that the ordinary custom of the business by the dairy from whom defendant received them was usually. In such case, of course, there was no reasonably of proof of demand in order to make introduction. There was, however, some evidence of a demand, and the opinion of the supreme court states that even if demand as made was insufficient, it was sufficient to show that a demand, if one had been made, would have been unavailing, and cites Johnson v. Hays, 6 Ills. 449, and Jones v. Brewer, 92 III. 74.

Such a case readily distinguishable from the instant one should certainly not be construed as overruling well considered cases or as authority for the proposition now urged that if a defendant defends on the merits he is precluded from insisting on the necessity of a demand by the plaintiff where the defendant makes possession under a conditional sales contract.

I do not understand that such a rule has ever been announced by the Supreme court of this State. That it is against the weight of the authority, see the annotation to Anderson v. Shipper, 104 Wash. 126; 175 Pac. 1; 5 A.L.R. 131-134, where the authorities are collected, and also the note to Linnett v. Belady, 169 S. W. 444, 50 L. R. A. 788; 52 A.L.R. 773. I am constrained to state this present opinion I am persuaded that such a rule, as stated in the majority opinion, may easily be used for purposes of perpetrating it this class of cases.

35432

JOSEPH BEZARK,
Appellant,

vs.

MOLLIE BEZARK,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

14 7

266 I.A. 595

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal complainant asks the reversal of an order of the Circuit court finding him in contempt for failure to pay alimony and ordering him committed to the Cook county jail. He alleges that he made a sufficient showing of his inability to pay and hence should not be held in contempt.

The order for alimony was entered June 6, 1929, ordering complainant to pay $20 a week and $50 for temporary solicitor's fees. June 17, 1930, a decree was entered giving complainant a divorce on the ground of extreme and repeated cruelty of the defendant. The decree also found that complainant was in arrears as to temporary alimony in the amount of $375. June 28, 1930, defendant filed a petition alleging that although she had engaged counsel in her behalf she had received no notice of hearing of the divorce proceeding, and asked that the decree be set aside. On November 7, 1930, the chancellor ordered the decree vacated and the cause was set for trial. Complainant prayed an appeal from this order, which apparently was not perfected.

May 23, 1931, defendant filed a petition setting forth that by the order of court she was granted custody of the three minor children of the parties and that complainant was ordered to pay her the sum of $20 a week for their support and maintenance, but that complainant was in arrears in the sum of $925; that in November, 1930, complainant left the jurisdiction of this court, and to the knowledge of petitioner did not return until May 22,

1931. She asked that an attachment issue requiring the complainant to show cause why he should not be found in contempt. The complainant thereupon filed a verified answer and the matter came on to be heard by the chancellor upon the petition, answer and affidavit and evidence introduced by both parties. The court found that there was past due to defendant for unpaid alimony and for the maintenance and support of the children the sum of $915; that complainant was able to pay the same but wilfully failed and refused to do so; that he was guilty of contempt and he was ordered committed to the common jail of Cook county until he should pay the said sum of $915, or until released by due process of law.

Complainant by his answer alleged that he operated a refreshment stand in South Haven, Michigan, during the summer months and that for a time he made the payments called for by the order of court; that after the closing of the summer season of 1930 he was unable to comply with the order of the court and fell in arrears in the payments of the alimony; that in February, 1931, he obtained a position at Palm Beach, Florida, receiving compensation of $25 a week; that out of this he made certain payments to defendant on account of alimony; that he returned to Chicago in May, 1931, when he was served with the writ of attachment. His answer alleged that defendant was earning $10 a week; that she received money from their son for the use of his room and that the father of complainant paid her for his board and room. Complainant testified that he did not have steady employment from October, 1930, until February, 1931, and said that he was willing to pay as much as he could to defendant.

Defendant testified that she had not received any money from complainant since September, 1930; that she lived on charity and from food received from the school; that she had borrowed money from a Mrs. Tavens to the extent of $85, and from Mrs. Berz $197; that she owes these amounts to these women; that she went with

complainant for many years to the resort in South Haven where he had a stand, and that they saved approximately $2,000 to $2,500 a season; that the business last season (1930) was about the same as it had been heretofore; that complainant employed quite a number of people; that she had information that his earnings in Florida were about $75 a week; that his earnings of the last season at South Haven had been $2,000 to $2,500 net, after paying all expenses; that he was living with another woman at this time and had taken the other woman with him to South Haven when he goes there; that she was the cause of the breaking up of their home; that complainant has an expensive automobile which is not more than six months old.

Mrs. Tavens testified that she was well acquainted with both complainant and defendant; that defendant was indebted to her in the sum of $85; that shortly prior to complainant's departure to Florida he had stated to the witness that if the wife, the defendant, "knew of his financial worth that she would have a fit;" that he had plenty of money, and that he further stated that he was "living the life of Reilly" and that he was going to make Mrs. Bazark, the defendant, "fight for every cent she ever received from him." The witness also said that she knew of her own knowledge that the moneys she had loaned to defendant were used to purchase food for the three minor children; that complainant had always made "a splendid living for the family" and had boasted that he was having "a grand old time with women now." Mrs. Berg testified that she knew both of the parties and had advanced to defendant $197, and knew that this money was used for purchasing food and clothing for the three minor children and food for the defendant.

We cannot say that the chancellor, in view of this evidence, was not justified in finding that the complainant wilfully refused

to pay alimony although able to do so. The evidence shows that complainant was spending his money on persons other than his wife and children. Complainant's first duty was to comply with the order of court with regard to supporting them. He cannot avoid this duty by merely asserting that he is unable to pay.

Complainant says it was the duty of the defendant to preserve the evidence by certificate or bill of exceptions. Whatever may be the rule in a proceeding of this sort, the record includes a certificate of evidence duly signed by the trial Judge. According to the brief of complainant he filed it as he was "desirous of having this matter reviewed." It is immaterial which of the parties filed the certificate of evidence.

No good reason appears for disagreeing with the conclusion of the chancellor, and the order appealed from is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

O'Connor, J., and Baldwin, J., dissenting.

of the Chancellor, and the writ dismissed from is allowed.

No good reason appears for disagreeing with the conclusions
important weight at the positive tilted the certificate at evidence.
it as be was "desirous of making this matter received." It is
trial Judge. According to the trier of document as filed
record includes a certificate of evidence duly signed by the
Whatever may be its role in a proceeding at this sort, the
prepare the evidence by certificate or writ of declaration.

Complainant says it was the duty of the defendant to
this duty by merely asserting that he is unable to pay.
order of court with regard to subscription thus. He cannot avoid
and officers. Complainant's first duty was to comply with the
conclusion was something its entry on account that his writ

to pay filing charge, only to go on. The evidence shows that

35673

PAULINE MIKUS,
Defendant in Error,

vs.

CHARLES BARONOWSKI,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

157

266 I.A. 595[3]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error seeks the reversal of a judgment on verdict for $650, entered upon the trial of a tort action. Plaintiff is a tenant of the defendant at 3706 Houston avenue, Chicago, and alleged in her statement of claim that on the evening of December 24, 1927, while she was walking down the stairway on the premises one of the steps broke, throwing her to the ground, from which she suffered injuries.

The premises in question consist of a flat building in front and a house in the rear, both buildings occupied by tenants of the defendant. Plaintiff was a tenant in the rear house; there was a passage way running from the front of the lot alongside of the front building to the rear; the back part of the lot on which the house stands is considerably lower than the front part, and from this side passage at about opposite the rear of the front house is a stairway of about ten steps going down to the lower level of the back yard.

The jury could properly believe that this stairway was used in common by the tenants of both buildings and was under the control of the landlord, the defendant; that the fourth step from the top had been broken and the bottom step was also broken; the banister was also loose; this condition had existed for some time and repeated complaints had been made to the landlord to repair these steps, which he promised to do; that a few days before the

25313

DWELLING MINOR,
Defendant in Error,

vs.

CHARLES HAMMONDS,
Plaintiff in Error.

ERROR TO MUSKOGEE COUNTY
DISTRICT COURT.

2866 T.A. 395

Opinion by this writ of error seeks the reversal of a judgment in warrior Apr 1920, entered upon the trial of a jury section. Plaintiff is a minor of the retirement of 1920 against Dwelling, and alleged in her statement at trial that on the evening of December 24, 1917, while she was visiting down the street way on the premises one of the other brick, operating how it the evening of December 24, 1917, while she was visiting down the street. Plaintiff has a right in the rear house; under of the defendant. Plaintiff has a right in the rear house; under the lease in question consist of a flat building in front and a house in the rear, with buildings occupied by tenants there, from which she suffered injuries.

The premises in question consist of a flat building in front of the house, facing the east; the back part of the lot on which the house stands is considerably lower than the front part, and from this side descends at about opposite the rear of the front house is a stairway of about ten steps going down to the level of the back part.

The lady could scarcely believe that this stairway was used in common by the tenants of both buildings and she would the top had been broken and the bottom step was also broken; the condition of the landing, the defendant; that the lower step from plaintiff an also known; this condition had existed for some time and sufficient opportunity had been made to the landlord to repair same steps, which he promised to do; that a few days before

accident the husband of plaintiff told the landlord that the steps must be fixed or he would have to move; the landlord promised to fix them and apparently did attempt to do so, although, as the results show, not successfully. On the night of the accident plaintiff, who had been in the front house, was returning home to the house in the rear, going down the steps; when she reached the fourth step it broke, throwing her against the banister, which also broke, and plaintiff fell forcibly to the ground, receiving a broken arm and other injuries.

A landlord who rents different parts of his building to various tenants, reserving passageways and stairways for the common use of his tenants, is under an implied duty to keep such places in a reasonably safe condition and is liable for injuries to persons lawfully in the building, resulting from failure to perform that duty. Mueller v. Phelps, 252 Ill. 630, and many other cases. The jury could properly find that the failure of defendant to keep the stairway in repair was negligence for which he is liable.

The jury could also properly find that he should be held liable by reason of his agreement to make the stairways safe as a condition of the plaintiff and her husband remaining as tenants.

The question whether plaintiff was guilty of contributory negligence was properly submitted to the jury for determination. Plaintiff testified that she had used the stairways five or six times before she was injured. It is difficult to see what plaintiff might have done to have avoided the accident. She evidently relied upon the promise to repair and the attempt by the landlord to make these stairs safe. Defendant argues that it was contributory negligence to use the stairway at all and that plaintiff should have reached her home by going through the alleyway, thus avoiding the stairway. The jury could properly find that plaintiff

relied upon defendant's promise and attempt to repair the stairway and that she was not guilty of contributory negligence.

Defendant does not present any sufficient reason for reversing. The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

35690

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JAMES FAWCETT,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

16 7

266 I.A. 595[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant in the trial court, James Fawcett, was tried on an information which alleged that on September 21, 1931, in the city of Chicago he "did then and there have in his possession a .45 caliber automatic gun with the numbers defaced or changed in violation of section 2-A of Act revising law to deadly weapons amended by Act approved June 29th, 1931," contrary to the statute in such case made and provided." He was tried at the same time and upon the same evidence as that submitted in support of a similar information filed against one Sam Hunt, who has also sued out a writ of error from this court, No. 35691. A trial by jury was waived and the case submitted to the court, and the finding was: "The court finds the defendant guilty in manner and form as charged in the information herein of unlawfully changing, altering, and obliterating the manufacturer's number and mark of identification on a certain firearm, to-wit: an automatic pistol." Motions of defendant for a new trial and in arrest of judgment were overruled, and judgment was entered that defendant was guilty. According to the finding, he was sentenced to the house of correction for a term of ninety days and ordered to pay a fine of $100 and costs of $6.50.

It will be necessary to consider only one of the errors assigned and argued, namely, that the evidence fails to establish the guilt of the accused beyond a reasonable doubt. The statute in conformity with which the information was filed (see Laws of Illinois, 1931, p. 449) provides (sec. 2-A):

25696

266 I.A. 395

"No person shall change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on any firearm. Possession of any firearm upon which any such mark shall have been changed, altered, removed, or obliterated, shall be prima facie evidence that the possessor has changed, altered, removed or obliterated the same."

The evidence submitted in behalf of The People was to the effect that on September 21, 1931, defendant Fawcett and also Sam Hunt were arrested by Henry Fogelsang, a police officer of the South Park Commissioners in the city of Chicago. Fogelsang testified that he saw Fawcett and Hunt at Monroe street a little east of the Illinois Central viaduct in Grant park at about two o'clock p. m., on that day; that they were running east toward the lake and were close together; that he heard a noise which sounded to him like a shot or backfire; that he went after these two men after they ran down a driveway in back of the Goodman theatre at about Adams street, where they turned into an areaway; that he went in after them and called to them to put up their hands; that they complied and he took them down the steps at that place, when another police officer came out of the parking place and the witness turned Fawcett and Hunt over to him, walked back and found this .45 caliber pistol on the ground about 25 or 30 feet away from where he had placed Fawcett and Hunt under arrest. He states positively: "I did not see the gun in the possession of either one of these men. The first time I saw the gun it was lying on the ground after I had come back there. I did not see the defendants throw anything away as they were running." On cross examination he stated that he did not see Fawcett and Hunt commit a misdemeanor of any kind; that he just saw them running and ran after them and that after he had placed them under arrest he went back and found the gun in the areaway; that it might have been 40 or 50 feet from where Fawcett and Hunt were arrested but that it was at least 30 feet away; that the gun might have been there before Fawcett and Hunt arrived, but he did not know and he was not able to say that they ever had

"No person shall change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on any firearm. Possession of any firearm upon which any such mark shall have been changed, altered, removed, or obliterated, shall be prima facie evidence that the possessor has changed, altered, removed or obliterated the same."

The evidence submitted in behalf of the People was to the effect that on September 11, 1931, defendant Fawcett and also Ike Hunt were arrested by Henry Vogelsang, a police officer of the South Park Commissioners in the city of Chicago. Vogelsang testified that he saw Fawcett and Hunt at Monroe street a little east of the Illinois Central tracks at about ten o'clock p. m., on that day; that they were walking east toward the lake and were close together; that he heard a noise which sounded to him like a shot or backfire; that he went after these two men after they ran down a driveway in back of the Chicago Athletic at about Adams street, where they turned into an areaway; that he went in after them and called to them to put up their hands; that they complied and he then took them out the steps at that place; that another police officer came out of the parking place and the witness turned Fawcett and Hunt over to him, walked back and found this .38 caliber pistol on the ground about 25 or 30 feet away from where he placed Fawcett and Hunt under arrest. He stated positively: "I did not see the gun in the possession of either one of these men. The first time I saw the gun it was lying on the ground after I had come back there. I did not see the defendants throw anything away as they were running." On cross examination he stated that he did not see Fawcett and Hunt commit a misdemeanor of any kind; that he just saw them running and ran after them and that after he had placed them under arrest he went back and found the gun in the areaway; that it might have been 40 or 50 feet from where Fawcett and Hunt were arrested but that it was at least 35 feet away; that the gun might have been there before Fawcett and Hunt arrived, but he did not know and he was not able to say that they ever had

this gun in their possession or ever owned it; that the areaway was a place used by the students of the Art Institute; that men were working on a fountain which was being built there. The witness said that he inquired around and asked some of the men who were working as to whether they saw this gun thrown but that he did not find anyone who said he had seen it.

Ernest J. Sloey, a police officer of the city of Chicago, assigned to the detective bureau, testified that he was familiar with the .45 caliber automatic gun and, over the objection of defendant, was allowed to testify that he sent this gun to the ballistic experts, who were unable to bring out the numbers. This witness said there were no numbers on the gun and that the numbers usually appeared on the side, immediately in back of the chambers. The gun was offered in evidence and was admitted over objection.

This was all the evidence offered by the State.

Defendant Sawcett then testified to the effect that he was at the time in question walking on the north side of Monroe street, west of the Illinois Central railroad; that he heard a noise that seemed to be a squeaking of brakes on Monroe street; that there were at least forty or fifty persons there at the time and everybody seemed to hurry to get off the boulevard; that police officers and citizens started to run and he was in the midst; that there was some noise like shots fired, so he ran too; that a police officer came up and asked what was the matter, and that the witness replied that he did not know. Sawcett positively swears that he did not have a gun in his possession and did not throw a gun away; that the first time he saw this gun was when it was in the hands of the police officer. He testified that he did not run any more than anybody else; that everybody seemed to run; that there were about 500 persons gathered there in about thirty seconds; that the gun did not belong to him; that he never had it in his possession; that he never

owned it nor did he deface it or take off the numbers. On cross-examination he stated that he was at the place in question at the time of the occurrence for the purpose of meeting his wife; that Sam Hunt was not with him and that he did not know Sam Hunt until the day after the officer arrested them both; that he was caused to run by the commotion, the squeaking of brakes that sounded like shooting, and the people saying, "Look out." In fact, the witness said he was not exactly running but was moving out of the way; that he did not notice Hunt; that there were people in front of him and behind him and he did not see the officer until he had stopped; that there were 40 or 50 people near at the time and the officer stopped everyone.

Sam Hunt was sworn and testified that the gun was not his; that he had never seen it before that he knew of; that he did not have it in his possession and did not own it, and that he did not take any numbers off the gun; that he was in Grant park at the time walking around; that he ran when he heard the shots; that the shots were not fired at him so far as he knew. He also testified that he did not know Fawcett prior to the time the officer arrested Fawcett and him; that he did not notice Fawcett running; that there were several persons running but that he did not know who they were or where they came from.

Henry Fogelsang was called in rebuttal and testified that when he arrested defendants there were other people there, maybe thirty; that he did not see four or five hundred people running away from Monroe street; that there were, however, quite a few persons running in different directions, machines stopped and the people were jumping out. On cross-examination he said that there were others running in the same direction as Fawcett and Hunt were; that he noticed one man who had no coat on going down the drive-way, and that he was not able to arrest him.

owned it nor did he defend it or take all the measure. To cross-examination he stated that he was at the place in question at the time of the occurrence for the purpose of meeting his wife; that Dan Lunt was not with him and that he did not know Ben Lunt until the day after the officer arrested them both; that he was passing to the westward, the opposite of course that wounds like those evidently received came both; that in fact, the witness was not the people saying, "Look out." In fact, the witness said he was not exactly running but was moving out of the way; that he did not notice Lunt; that there were people in front of him and behind him and he did not see the officer until he had shouted; that there were 40 or 50 people near at the time and the officer arrested everyone.

The last one sworn and testified that the gun was not his; that he had never seen it before that he knew of; that he did not have it in his possession and did not own it, and that he did not take any measure at all for gun; that he was in front part of the waiting crowd; that he ran when he heard the shots; that the shots were fired at him so far as he knew. He also testified that he did not know Bennett prior to the time the officer arrested Bennett and him; that he did not notice Bennett running; that there were several persons running but that he did not know who they were or where they came from.

Henry Ingalsbee was called in rebuttal and testified that when he arrived there were other people there, maybe thirty; that he did not see four or five hundred people running away from Eunice street; that there were, however, quite a few persons running in different directions, sometimes stopped and then were always running in the same direction as Bennett and that were; that he noticed one man who had in most on right, when the difficulty was, and that he was not able to attempt him.

The gun itself does not appear to have been placed in evidence, but it is described, we think, sufficiently, and Officer Fogelsang was asked if this was the gun he picked up and replied, "Yes, sir."

It is, we presume, unnecessary to cite cases to the effect that a judgment of conviction in a criminal case cannot be sustained by a court of review, unless the guilt of the defendant is established beyond a reasonable doubt. Recent cases of the Supreme court which sustain this rule are People v. Watts, 204 Ill. 245; People v. Heep, 302 Ill. 530, and People v. Hudson, 341 Ill. 192. There is not a scintilla of direct evidence in the record tending to show that either Fawcett or Hunt changed or altered or removed or obliterated the name of the maker, model, manufacturer's number or any other mark of identification from this firearm. The argument seems to be that as the firearm was found near the place where the arrest occurred the possession may be inferred from that fact. The State cites the case of People v. Malega, 255 Ill. App. 474, and urges that a conviction in the trial court was there sustained by this court upon similar testimony. Defendant there was accused of carrying concealed weapons in violation of section 4 of the Deadly Weapon act, Cahill's St., ch. 38 par. 141 (4); The facts of that case and this one are not at all alike. There the officers saw defendant take a dark object from his righthand overcoat pocket and throw it towards the south. The defendant was arrested and searched and no weapons being found the officer was about to release him when advised by other officers that they had found three revolvers near the place where defendant had taken the object out of his pocket and thrown it. There was testimony to the effect that at the time of the arrest one of the officers asked the defendant where he was going with the guns and why he threw them when he saw the officers coming, to which defendant replied, "You would not want me

to keep them in my pocket until you searched me." Two of the officers also testified that the defendant had offered them $40 if they would release him, and defendant did not deny the testimony. That evidence is quite different from that given here, as the officers in this case testified positively that they did not see the gun in the possession of either Fawcett or Hunt and did not see either of them throw it away. The State argues that the inference of possession may be drawn from the testimony not abstracted to the effect that the gun which the officer picked up was the one produced in court; but against which one of these defendants could that inference be drawn? It is necessary to a conviction that the evidence should show personal guilt; that is, that some particular defendant was guilty. It is not contended that Fawcett and Hunt carried the gun as a joint enterprise, and the fact that the gun was picked up in the manner described in the evidence, if considered as evidence of guilt as to one, would tend to show the innocence of the other. It may be that one or the other was guilty of carrying a concealed weapon which apparently was the first charge lodged against each of them. But the competent evidence in the record does not justify any inference further than a suspicion, on which a finding of guilt may not be based in a criminal case.

There being no evidence in the record upon which a finding of guilt may be based, the judgment is reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

O'Connor, J., and Moriarty, J., dissent.

Judgment.

of guilt may be drawn, the judgment is reversed.

There is no evidence in the record upon which a finding of guilty may not be based in a similar case.

Where a finding of guilt may rest upon a conclusion, on record does not justify any inference further than a conclusion, on judged against each of them. But the competent evidence in the carrying a concealed weapon competently was the first charge evidence of the other. It may be that one of the other two guilty of was placed up in the manner described in the evidence, it remained as evidence of guilt as to one, would tend to show the commission of the other two charges. It is not contended that Purcell and that Tenbeur was guilty. It is not contended that Purcell and that carried the gun as a joint enterprise, and the fact that the gun dance would show personal guilt; that is, that some particular defendant be drawn? It is necessary to a conviction that the evidence in order; but against which one of those defendants could the presumption of guilt be drawn into the defendant's mind the effect that the gun which the officer placed up was the property of possession may be drawn into the testimony not mentioned in the either of them threw it away. The State argues that the inference gun in the possession of either Tenbeur or Hunt did not see the fingers in this case testified positively that they did not see the that evidence is quite different from that given here, as the witness also testified that the defendant had stepped down in the they would welcome him, but defendant did not duty the testimony.

35691

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

SAM HUNT,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

266 I.A. 596

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in this case are similar to those which appear in the case of the People of the State of Illinois v. James Fawcett, No. 35690, in which an opinion has this day been filed. The cases were tried together and the same evidence submitted. There was a finding of guilt with judgment thereon in each case, and separate writs of error were sued out of this court where the cases were consolidated for hearing.

It is unnecessary to again recite in detail the evidence which was submitted on the hearing. In brief it is to the effect that at the time in question and on the lake front in Chicago a shot was fired by someone; that excitement followed; that quite a number of people ran away from the place; and that an officer of the South Park Board arrested these two defendants. Later some thirty or forty feet away from the place of arrest an automatic pistol was found on the ground, and there is some evidence tending to show that the manufacturer's number was obliterated therefrom. If there was evidence sufficient to show that the pistol was in the possession of defendant , under the provision of the statute this would make a prima facie case. There was, however, no direct evidence tending to show that the pistol in question was ever in possession of this defendant or that he owned it, and the evidence to the effect that it was found some thirty feet away from where the arrest took place by one of the police officers is just as consistent with the guilt of the other defendant or a number of other persons who were running at that time as it is with the guilt of

See I.Y. 396

this defendant, Hunt. The evidence is not only insufficient to establish guilt as required in a criminal case beyond a reasonable doubt, but would be insufficient to support a finding in a civil case.

The judgment in this case also is reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

this defendant, Hunt. The evidence is not only insufficient to establish guilt as required in a criminal case (citing a reasonable doubt, but would be insufficient to support a finding in a civil case.

The judgment in this case (is reversed).

(CONCURRED.

O'Connor, P. J., and Kingsley, J., concur.

35456

UNION BANK OF CHICAGO, a corporation, Guardian of the Estate of BENJAMIN MILLER, a minor,

Appellee,

v.

CITY OF CHICAGO, a municipal corporation,

Appellant.

207

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 596[2]

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In an action in case, commenced October 5, 1929, to recover damages for personal injuries received on September 16, 1929, by Benjamin Miller, a boy about 10 years of age, there was a trial before a jury in April, 1931, resulting in a verdict and judgment against the City of Chicago in the sum of $3,300, and the present appeal followed.

The suit was commenced originally against the City and Sanitary District of Chicago and Commonwealth Edison Company, but on the eve of the trial, on plaintiff's motion, it was dismissed as to said other defendants.

Plaintiff's declaration consisted of one special count, to which the City filed a plea of the general issue. The City's liability is predicated upon the theory that it negligently maintained an attractive nuisance. Plaintiff averred that on September 16, 1929, the City possessed and maintained a certain electric light pole, located on South LaSalle street (a public street) between 44th and 45th streets, Chicago; that the pole was on or near the sidewalk; that near its top was fastened, by means of a bracket, an electric lamp and certain wires, carrying a current of electricity of high voltage which was used to supply light to the lamp as well as to

voltage which are used to supply light to the track as well as to
track and certain wires, consisting a network of electricity of light
that wear its rails are fastened, by means of a bracket, or bracket
and light wires, directed that the wire ends or be part the signalmit
hole. Instead an lamp Lamplite wheel (a lamplo wheel) between light
16, 1922, the city passengers and entering a carrel electric light
tained an attractive entrance. Lamplit wearing that an objection-
lity is practiced when the theory that it negligently mis-
to avoid the city light a plan of the General agent,
ve to and other enjoyment.

Lamplit's decoration consisted of the General agent,
on the eye of the trial, an plaintiff's motion, it was dismissed
Lamplit Electric of Chicago and Commonwealth Edison Company, and
the present appeal follows.

The suit was commenced originally against the City and
judgment against the City of Chicago in the sum of $3,000, and
a trial before a jury in April, 1921, resulting in a verdict and
1920, by Lamplit Light, a body about 10 years of age, there was
received damages for personal injuries received on September 16,
In an action in case, commenced October 3, 1919, to

Mr. Justice Lamplit delivered the opinion of the court.

Abstract.

CITY OF CHICAGO, a municipal
corporation.

v.

Appellee.

CHICAGO ELECTRIC LIGHT
corporation, Corporation of the
State of Lamplit Light,
a minor.

Appellees.

32626

CHICAGO, BOOK COMPANY.

PRINTED AND PUBLISHED

266 I.A. 396

other similar lamps on other similar poles; that the pole and bracket were made of iron; that the pole was of such size that it could easily be climbed by an active boy; that it and the wires, lamp and other appliances "were attractive and alluring to the instincts of children," playing on the street, and the pole "was readily accessible and visible from the street and sidewalk," of which facts the City had or should have had knowledge; that it became the City's duty to exercise ordinary care and caution to maintain the pole, wires and appliances in a reasonably safe condition so as to avoid injury to children who might play near or upon the pole; that, regardless of its duty, it negligently maintained the pole, wires and appliances, "in a dangerous and unsafe condition" in that the wires, lamp, etc., attached to the pole, were "left uninsulated," or were "so poorly insulated" as to permit an electric current of high and dangerous voltage to be "readily communicated to anyone on the pole who might come near or in contact with the wires and lamp;" that the pole, wires, lamp and appliances were "an attractive nuisance" and many children previously had been attracted thereto and had played on the pole; that on September 16, 1929, Benjamin Miller, a minor of about 10 years and inexperienced as to the danger of electric wires carrying a high voltage, was naturally attracted to the pole and the climbing thereof, and that while climbing it he came in contact with certain wires, appliances or the lamp; and that as a result he was severely burned about his arms, hands and body and was caused to fall to the ground and sustained a fracture of his pelvic bone and was otherwise severely and permanently injured, etc.

On the trial, as to the location, character, etc., of the pole and the details of the accident, said Miller (about 10 years old at the time) testified, as did four other boys of about the same age who were his playmates. Paul Hoppe, a witness to the

the same age who make his playmates. Next Bobbe's witness to
leave off at the time) testified; he did find other pole of about
the pole and the details of the wounds, with Griffin (about 10
"In the trial," as to the location, structure, etc., of
injured", etc.

fixtures of his private home and was otherwise severally and personally
heard his pals and was induced to fall to the ground and sustained a
leg; and that as a result he was severely burned about his arms,
and if he came in contact with certain wires, nobilities or the
attached to the pole and the climbing thereof, was shot while climb-
the danger of electric wires carrying a high voltage, was certainly
Benjamin Miller, a minor of about 10 years and inexperienced as to
charge and had played on the pole; that on September 12, 1928,
extraordinary influence" and each children previously had been attracted
and limb;" that the pole, wires, lamp and obligations were "an
subject on the pole who might come near or in contact with the wires
current of high and dangerous voltage to be "readily communicated to
maintained," or were "so poorly insulated" as to permit an electric
in that the wires, lamp, etc., attached to the pole, were "left
pole, wires and appliances," in a dangerous and unsafe condition
pole; that, regardless of its duty, it negligently maintained the
so as to avoid injury to children who might play near or upon the
maintain the pole, wires and appliances in a reasonably safe condition
become the City's duty to exercise ordinary care and caution to
which faces the City and or should have had knowledge; that it
readily accessible and visible from the street and sidewalk," of
institute of children," playing on the street, and the pole "was
lamp and other appliances "were attracting and clinging to the
could easily be climbed by an active boy; that it was the street,
pronged were made of iron; that the pole was of such size that it
other similar lamps on other similar poles; that the pole and

accident from across the street, also testified. Two photographs of the pole and vicinity were introduced in evidence, and an electrical repair man for the City, named McLean, also testified for plaintiff. The City's only witnesses were two of its electrical engineers, named Baumer and Tideman. At the conclusion of plaintiff's evidence, and again at the close of all the evidence, the City moved for a directed verdict in its favor but the motions were denied.

From plaintiff's evidence the following facts appear: The pole, standing in a park space between the sidewalk and the curb of LaSalle street and near the curb, was of tubular iron or steel, about 30 feet high, 4 inches in diameter at the top and 5 inches in diameter at the bottom. Starting about 9-1/2 feet from the ground was a series of steps or rungs, about 18 inches apart, leading toward the top. About half way between the last step and the top was an iron bracket firmly attached to the pole, extending out a short distance over the curb and being a few feet from the top of the pole, where there was an attached insulator. On this insulator was strung a heavy wire, carrying an electric current of about 3,400 volts. This wire extended to the north and to the south where it was supported by similar poles in the street, each about 125 feet away. From the bracket was suspended an electric lamp with a round metal reflector. Other wires connected the main strung wire with the lamp. These other wires were covered with a "weather-proofing," not sufficient to act as an insulator, for the purpose of protecting them from corrosion. If a person on the pole should come in contact with these wires or with the metal reflector of the lamp he would be liable to receive a severe shock. There were no warning signs on the pole. About 7 o'clock on the evening of the accident the Miller boy, with

accident from across the street, also testified. Two photographs of the pole and vicinity were introduced in evidence, and an electrical repair man for the city, named Wolcott, also testified for plaintiff. The city's only witnesses were two of its electrical engineers, Duncan Ramsey and Tidwell. At the conclusion of plaintiff's evidence, and again at the close of all the evidence, the city moved for a directed verdict in its favor but the motions were denied.

Tom Plaintiff's evidence the following facts appear: The pole, standing in a park across Belmont Ave sidewalk and the curb of Imperial street and near the curb, was of tubular iron or steel, about 30 feet high, 4 inches in diameter at the top and 8 inches in diameter at the bottom. Starting about 3-1/2 feet from the ground was a series of steps or rungs, about 12 inches apart, leading toward the top. About half way between the last step and the top was an iron bracket firmly attached to the pole, extending out a short distance over the walk and being a few feet from the top of the pole, where there was an attached insulator. On this insulator was wound a heavy wire, carrying an electric current of about 7,600 volts. This wire extended to the north and to the south where it was supported by similar poles in the street, each about 125 feet away. From the bracket was suspended an electric lamp with a round metal reflector. Other wires connected the main around wire with the lamp. These other wires were covered with a "weather-proofing," but sufficient to act as an insulator, for the purpose of protecting them from corrosion. If a person on the pole should come in contact with these wires or with the metal reflector of the lamp he would be liable to receive a severe shock. There were no warning signs on the pole. About 7 o'clock on the evening of the accident the night boy, with

other boys of about the same age were playing in the street near the pole. One boy suggested climbing the pole and said "Let's see who can climb the highest." Thereupon one boy climbed up to the first step by putting his arms and legs around the pole and "shinnying" up; then two other boys climbed up to the third step; then the Miller boy climbed up to the fourth step and came down; then he climbed up again nearly to the top, waved his arm to those below, touched one of the uninsulated wires or a part of the lamp or reflector, received a shock and fell to the ground, temporarily unconscious, and received the permanent injuries complained of. Plaintiff testified in part:

"We climbed the pole that night for fun, to see who could go up the highest. To climb it I would put my arms and legs around it and 'shinny' up. Then I reached the 'little steps,' on each side, I could step further up on them. I climbed the pole twice that night. * * I did not climb up on a bet or a dare, but just for fun. * * The second time up I was near the light. When I got there I was waving to the boys below, and accidentally my hand hit the wire there, * * and I got knocked down, unconscious. When I woke up I was in the hospital. * * I saw boys playing around the pole at other times; I have seen them climb up part of the way at different times. * * It seemed to me a lot of fun to do this and the pole was easy for me to climb. * * I did not know anything about electricity before I got hurt, or that the light or those wires were dangerous. When I was at home and used to fool around the electric lights and wires in the house, they never hurt me * *. Nobody ever told me not to climb that pole. I saw other boys climbing it and I thought I would climb it, too; * * The pole is about the same as the other poles in the neighborhood. There was not anything about this pole that appealed to me more than any other light pole in the neighborhood. There was nothing the matter with it; so I climbed up there; * * I couldn't see any danger."

Plaintiff's witness, Paul Hoppe, a painter and decorator by trade and who lived just across the street from where the pole stood, testified that he had seen the pole standing there for about 17 years; that there are two such poles in the block, but the children played around and upon this particular one; that "on any summer night you can always find a bunch of them right there;" that he had "seen kids climbing the pole a number of times;" that on the evening of the accident he was standing right across the street,

family testified in part:

"We climbed the pole three nights [illegible], to see the world from the ground. To climb it I would put my arms and legs around it and 'shinny' up. Then I reached the 'little shops,' an eight-side, I would stop further up on them. I climbed the pole twice that night. * * * I did not climb up to a 'little shop' but just the first. * * * The second time up I was more the light. Then I put there I was resting to the left below, and accidentally my hand hit like wire there. * * And I got knocked down, unconscious. Then I woke up I was in the hospital. * * I was then playing around the pole at other times; I went from them climb up part of the way at different times. * * It seemed to me a lot of fun to do this and the pole was easy for me to climb. * * I did not know anything about electricity before I got hurt, or that light or those wires were dangerous. When I was at home and went to turn around the electric lights one alike in him house, they never went back me * *. Today was told me not to climb that pole. I saw other boys climbing it and I [illegible] * * [illegible] * * The pole is about the same as the other poles in the neighborhood. There was not anything about this pole that appeared to me more than any other light pole in the neighborhood. There was nothing the matter with it; as I climbed up there! * * I couldn't see any danger."

Plaintiff's witness, Paul Lopez, a painter and decorator

by trade and who lived just across the street from where the pole

stood, testified that he saw when the pole standing [illegible] down

it [illegible] that there are two ends poles in the ground, not the

ordinary type [illegible] and when this particular one, that "on top

[illegible] around and when this particular one, that "on top

another night you can always find a bunch of them right there." Then

he [illegible] "on side climbing the pole a number of times" [illegible]

evening of the accident he was standing right across the street,

and "the boys were climbing up and down the pole;" that, finally, this "little fellow" climbed up a second time and as he came near the wires "a spark shot out" and he fell to the ground; and that he (the witness) ran, picked up the boy and afterwards summoned the police ambulance, which came and took him away.

The main contention of counsel for the city is that the judgment is against the law and that the court erred in refusing to grant the city's motions for a directed verdict in its favor. The argument is that under the holdings and decision in the case of Burns v. City of Chicago, 338 Ill. 39, the pole in question cannot legally be considered as an attractive nuisance. We cannot agree with the contention or argument. In the Burns case, where a boy about eight years old climbed a somewhat similar pole and met his death because of receiving an electric shock while on the pole, it was held that the city was not liable on the ground of maintaining an attractive nuisance, because the evidence disclosed that said boy had climbed the pole by extraordinary effort for the purpose of winning a wager. There is no such element disclosed in the present case, which is more similar in its facts to the more recent case of Wolczek v. Public Service Co., 342 Ill. 482, where our Supreme Court held that a liability to plaintiff existed, and on pages 490 and 491 distinguished the Burns case. In the case of Fleming v. City of Chicago, 260 Ill. App. 496, 505, decided by the third division of the appellate court for this district in March, 1931, said Burns case also was distinguished. Under the facts disclosed in the present case we are of the opinion that the questions, whether the city was negligently maintaining an attractive nuisance and whether the Miller boy at the time of the accident was exercising such care and caution as is required of one of his age, intelligence and capacity, were for the jury to determine (Flis v. City of Chicago, 247 Ill. App. 128, 133;

the jury to determine (Tite v. City of Bristol, 245 III. App. 134, 139; [illegible] as to whether or one of the parties, individually and corporately, were [illegible] the time of the accident was exercising such care and caution [illegible] ordinarily exercised by persons of the same age and [illegible] the opinion that the questions, whether the city was [illegible] eliminated. Under the facts disclosed in the present case [illegible] appellate court for this district in March, 1921, said Judge [illegible] Chicago, 230 III. App. 498, 508, decided by the third division of the [illegible] distinguished the Burke case. In the case of Tiedtke v. City of [illegible] held that a liability to plaintiff existed, and on pages 490 and 491 [illegible] Public Service Co., 248 III. 488, where our Supreme Court [illegible] one, which is more similar in its facts to the more recent case of [illegible] a court. There is no such element disclosed in the present [illegible] an exercise of ordinary care, because the evidence shows that said boy [illegible] the pole by unnecessary effort for the purpose of [illegible] it was held that the city was not liable on the ground of maintaining [illegible] pole about eight years old climbed a perfectly standard pole and fell [illegible] cannot logically be considered in an objective manner. In Bunge [illegible] cause with the construction or alignment. In the Burke case, there [illegible] of Burke v. City of Quincy, 256 III. 39, the pole in question. [illegible] The statement is that under the pleading and decision in the case [illegible] to grant the city's motions for a directed verdict in its favor. [illegible] judgment is against the law and that the court erred in refusing [illegible] the motion mentioned, which came out that way.

The main contention of counsel for the city is that the [illegible] and that "the boys were climbing up and down the pole;" that, finally, [illegible] "Little Fellow" climbed as a counter step and as he came back [illegible] the wires "a spark shot out" and he fell to the ground and that [illegible] (the witness) then placed up the pole one afternoon somewhere

Wolczek v. Public Service Co., 342 Ill. 482, 493-5); and we are not disposed to disturb the judgment. No point is made that the verdict is excessive.

Accordingly, the judgment of the superior court is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

Peterson v. Idaho Service Corp., 200 Cal. App. 2d 1, 19 Cal. Rptr. 211 (1962).

not disposed to disturb the judgment. The point is moot and we affirmed.

the verdict is erroneous.

Accordingly, the judgment of the superior court is

Barnes and Compton, J.J., concur.

35474

SADIE BOTKOWSKY,
Appellee,

v.

FLAMINGO HOTEL COMPANY,
a corporation,
Appellant.

21 A

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

266 I.A. 596[3]

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 1st class action in assumpsit, commenced in the Municipal court on January 7, 1930, there was a trial before a jury in June, 1931, resulting in a verdict finding the issues against defendant and assessing plaintiff's damages at the sum of $3500. After judgment had been entered on the verdict, defendant appealed.

In plaintiff's statement of claim she averred that defendant was and is the owner of the Flamingo Hotel, located at 5520 South Lake Shore drive, Chicago; that on May 1, 1928, she rented of defendant "on a month to month verbal tenancy" apartment No. 211 in the hotel "together with" a safety deposit box in defendant's vault in the hotel, at a rental of $90 a month; that she occupied the apartment and used the box for several months prior to September 25, 1928; that on that day there were contained in the box currency to the amount of $540 and five pieces of jewelry (diamond bracelets and rings) of the value of $4966; and that on September 25, 1928, "through the carelessness and negligence of defendant in the safekeeping of said safety deposit box * * and its failure to exercise reasonable care and caution for the safety of plaintiff's property therein contained, in that no proper guard was maintained for the protection of said property and the doors of the vault in which said box was contained were permitted to be and the same were open," etc., said currency

Plaintiff,

v.

FLEMING HOTEL COMPANY,
a corporation,

Defendant.

266 I.W. 396.

BE IT REMEMBERED that during the course of the above-

in a fist fight outside in Broadway, commenced in the Municipal Court on January 7, 1920, there was a trial before a jury in June, 1921, resulting in a verdict finding the issues against defendant and assessing plaintiff's damages at the sum of $2000. After judgment had been entered on the verdict, defendant appealing.

In plaintiff's statement of claim she averred that defendant was and is the owner of the Fleming Hotel, located at 2020 South Lake Shore drive, Chicago; that on July 1, 1920, she rented of defendant "on a month to month verbal tenancy" apartment No. 611 in the hotel, at a rental of $40 a month; that she occupied the apartment and used the box for several months prior to September 20, 1920; that on that day there were contained in the box entrusted to the tenant of $440 and five pieces of jewelry (diamond brooches and rings) of the value of $2000; and that on September 20, 1920, "through the carelessness and negligence of defendant in the employing of only safely deposit box + + and its failure to exercise reasonable care and caution for the safety of plaintiff's property therein contained," to

more plainly to be but the face down," etc., said assessed property and the goods of the said in which box are contained that no broken bones was sustained by the pavement of said

and jewelry were then and there lost to plaintiff, - "the same having been by persons unknown stolen from said box." Wherefore defendant became liable to pay to plaintiff the market value of the property so lost, which value was the total sum of $5506, etc. It will be noticed that while the action is in assumpsit, its gist is in tort for defendant's alleged negligence.

In the affidavit of merits, sworn to by Conrad Faber (defendant's agent and the manager of the hotel), it is alleged that plaintiff did not on May 1, 1928, or at any other time, rent from defendant a safety deposit box located in its vault; that the use of a box in the vault was given to plaintiff as a "gratuity;" that all payments of rentals were made by plaintiff solely for the use and occupation of said apartment occupied by her; that defendant was not careless or negligent in the safekeeping of said box, and that any loss, which plaintiff may have sustained as alleged, was not due to any failure of defendant to exercise reasonable care for the safety of plaintiff's property; that defendant "maintained a due and proper guard for the protection of plaintiff's property;" that any property claimed by plaintiff to have been deposited in said box "was stolen by an armed band of thieves or robbers, who overpowered said guard * * and other employees of defendant who were engaged in protecting said box, all without negligence or carelessness on defendant's part;" and that the market value of the property, alleged by plaintiff to have been deposited in the box at the time, is in fact much less than as stated in plaintiff's statement of claim.

On the trial plaintiff testified in her own behalf and she called several witnesses, among them J. Preston Jeffries, who was assistant manager of the hotel when plaintiff rented the apartment on May 1, 1928, but who neither during September, 1928, nor thereafter was in defendant's employ; William Bart, her son; and W. W. Kyle,

was in defendant's employ; William Burt, her son; and T. V. Kyle, on July 7, 1960, but who neither during September, 1959, nor thereafter was employed anywhere at the point when plaintiff ravaged the office masonry structure. Among them T. Preston Jeffries, who

On the trial plaintiff testified in her own behalf and fact such items as stated in plaintiff's statement of claim. (a photostatic copy of which was received in evidence as Exhibit 1) to be in plaintiff to have been deposited in the box at the time, is in defendant's hand;" and that the actual value of the property, pilfered pocketbook said box, all without negligence or carelessness on said items " and other employees of defendant who were engaged in "was stolen by an armed band of thieves or robbers, who overpowered and property claimed by plaintiff to have been deposited in said box and number known for the protection of plaintiff's property;" that the safety of plaintiff's property that defendant "maintained a due not due to any failure of defendant to exercise reasonable care for that any loss, which plaintiff may have sustained as alleged, was was not occasioned or negligent in the performance of said part, and and occupation of said apartment described by her; that defendant all payments of rentals were made by plaintiff solely for the use of a box in the vault now given to plaintiff as a "premium"; that defendant a safety deposit box located in its vault; that the use plaintiff did not on May 1, 1959, or at any other time, rent from (defendant's agent and the manager of the hotel), it is alleged that

In the affidavit of merits, sworn to by Conrad Kober it is stated that while the motion is in nature of a demurrer, the plaintiff will be noticed that while the motion is in nature of a demurrer, the property so lost, which value was the total sum of $2000, etc. defendant become liable to pay to plaintiff the market value of property been by persons unknown stolen from said box." Therefore and jewelry were then and there lent to plaintiff, - "the same

who was allowed to give certain testimony over objection as to a claimed usage or custom among certain hotels in Chicago. On defendant's behalf four of its employees, and a police sergeant in Chicago, gave testimony as to occurrences early in the morning of September 25, 1928, (about 3 o'clock) when a band of armed robbers came into the hotel building, procured entrance to the vault, violently broke into some of the safety boxes (including plaintiff's) by the use of chisels and other tools, and stole the contents. On the questions, whether defendant at the time and prior thereto failed to exercise ordinary or due care under the circumstances, and whether the privilege of using the box was given to her as a gratuity, the evidence was conflicting. But, inasmuch as we have reached the conclusion that the judgment must be reversed on account of errors committed by the trial court in the given and refused instructions and in the admission of certain testimony offered by plaintiff, and as the cause may be retried, we refrain from a detailed discussion of the testimony. We may say, however, that the case appears to us to be an exceedingly close one onthe question of defendant's liability to plaintiff in any sum.

In such close cases it is required that the instructions to the jury should be accurate. One of the given instructions offered by plaintiff is as follows:

"The court instructs you further that if you believe from the evidence in this case that by the exercise of ordinary care on the part of defendant the burglary and loss of plaintiff's property, if you believe from the evidence that there was a burglary and that as a result thereof plaintiff lost property, might have been prevented, then said burglary is no defense to plaintiff's claim in this suit, and you should find the issues in favor of plaintiff."

We are of the opinion that the giving of this instruction, which directs a verdict for plaintiff, is reversible error. It does not embrace all the facts and conditions essential to such a verdict. It makes no mention of defendant's want of due care being the proximate

It makes no mention of defendant's mark of duo cave peted the document nor explains all the facts and conditions necessary to make a variation which disrespects a verdict for plaintiff, is reasonable error. It does not appear to me of the opinion that the giving of this instruction, even upon proper find the burden to prove of plaintiff."

~~The court instructed further that if you believe from~~ the evidence in this case that the execution of original note on part of defendant and loan of plaintiff's property, if you believe from the evidence that there was a pawnbroker and that ~~we a fraud thereof plaintiff lost property, which has been proved,~~ then said pawnbroker is no defense to plaintiff's claim in this suit, offered by plaintiff is as follows:

"The court instructs the jury that the instructions to the jury should be answers. One of the given instructions in such a form you have one that the execution of original's property is plaintiff is not sum.

It may be accordingly clear one with question of defendant's property of the contract. We may say, however, that the case cannot be as the case may be tested, we silvain item a detailed discussion and in the admission of certain testimony offered by plaintiff, and committed by the trial court in the given and refused instructions question that the judgment must be reversed on account of matters evidence was conflicting. But, inasmuch as we have reached the conclusion the duality of using the pen was given to jury as a question, the to examine evidence only or can have under the circumstances, and whether the questions, whether defendant at the time and prior thereto relied by the use of opinion and other facts, and which the contents. On violently broke into some of the safety doors (including plaintiff's) came into the hotel building, Emerson returned to the vault; September 28, 1929, (about 2 o'clock) when a band of armed robbers

cause of plaintiff's claimed damage, and it disregards completely the question whether or not plaintiff's use of the safety box had been given to her as a gratuity. Furthermore, the use of the words, that the burglary and loss of plaintiff's property "might have been prevented," is misleading. In Illinois Iron & Metal Co. v. Weber, 196 Ill. 526, 531, it is said: "It has always been held that where the court directs a particular verdict if the jury should find certain facts, the instruction must embrace all the facts and conditions essential to such a verdict. It is not required that one instruction shall state all the law, and instructions may supplement each other and supply defects, but where an instruction directs a verdict upon certain conditions it must state the conditions correctly." (See, also, Pardridge v. Cutler, 168 Ill. 504, 512; National Importing Co. v. E. A. Berr & Co., 324 Ill. 346, 359.)

Among the instructions offered by defendant were the two following, which the court refused to give and which were not sufficiently covered by other given instructions, viz:

"The jury are instructed that while the law permits a plaintiff in a case to testify in her own behalf, nevertheless the jury have a right, in weighing her evidence and determining how much credence is to be given it, to take into consideration the fact that she is the plaintiff and that she is interested in the result of the suit.

"The Court instructs the jury that while they are the judges of the credibility of the witnesses, they have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defendant, simply because such witness was or is an employee of the said defendant, but it is the duty of the jury to receive and weigh the testimony of such witness in the light of all the evidence the same as they would the testimony of any other witness, and to determine the credibility of such employee by the same principles and tests by which they determine the credibility of any other witness."

Under the evidence and considering the fact that all of defendant's witnesses, except the police sergeant, were its employees on September 25, 1928, or at the time of the trial, we think that the court committed reversible error in refusing to give said instructions. As to the first, see the cases of West Chicago Street Railroad Co. v. Dougherty, 170 Ill. 379, 382; Chicago, etc. Ry. Co.

Morrison Co. v. Thompson, 120 Ill. 518, 522; Shipman, op. cit. §§. cc.
Instructions. On to the first, see the cases at Note Section 2, supra.
the court committed reversible error in refusing to give such
de September 27, 1889, or at the time of the trial, as ruling that
defendant's attorney, namely the police magistrate, was acting as
Under the evidence and considering the case that all of
ment.".

The court is asked to rule that certain of the plaintiff's witnesses
are the only witnesses in the case who testify as to the alleged
matter of justification or defense in the first or all the allegations
the plaintiff as such, but it is the duty of the jury to examine and
the main statement, but it is the only of the jury to examine and
the testimony of each witness, and to determine the credibility of any
disregard the testimony of an interested witness even on behalf of
justice of the peace or any witnesses, they have no right to
of the suit.

"The court instructs the jury that while they are the
that she is the plaintiff and that is interested in the result
lowing, which the court refused to give and which was modified-

In refusing to give these instructions, also

(See, also, Jacksonville R. Company, 109 Ill. 204, 212; Baltimore &
Co. v. L. V. Road Co., 109 Ill. 345, 350.)

Among the instructions offered by defendants were the fol-

vented them entering conditions it must state the conditions separately.
ency plan, and specify defects. But where an instruction attempts a
instruction omits state all the law, and instructions may sometimes
conditions necessary to make a verdict. It is not intended that one
ting certain facts, the instruction must enumerate all the facts and
that where the court directs a peremptory against if the jury should
Ry. Co., 122 Ill. 266, 283. It is said: "If the charge should omit
been instructed," in stating that a Motion for a Motion
ment", that the instruction at Issue of Plaintiff's Counsel "might
been given to put it a question." Whatever, the use of the
question whether or not Plaintiff's use of the motion for new
ation of Plaintiff's stating theories, and if discretion controls

v. Burridge, 211 Ill. 9, 13; Chicago Union Traction Co. v. Hanzen, 125 Ill. App. 153, 160; Chicago, etc. Ry. Co. v. Spurney, 69 Ill. App. 549, 551. And as to the second, see the cases of Olsen v. Chicago City Ry. Co., 153 Ill. App. 75, 78; Randall v. Sterling, etc. Ry. Co., 158 Ill. App. 56, 58.

During the trial plaintiff's witness, W. W. Kyle, was called for the purpose of establishing a certain custom or usage among apartment hotel keepers in Chicago in the year 1928. He testified in substance that he was the manager of a Chicago restaurant; that prior to engaging in that employment he had for 15 years been in the "hotel business" in Chicago and elsewhere; and that latterly he had been night auditor in one apartment hotel and assistant manager in other apartment hotels in Chicago (naming them). He then was asked on direct examination if he knew what was "the general custom and usage" in Chicago in the year 1928, "in hotels of the character and description of the Flamingo Hotel and other hotels of similar character, with respect to the vaults, wherein are contained safety deposit boxes, being locked at night?" Upon answering in the affirmative, he then was asked "What was that custom and usage?" He replied that as to "the properties I was associated with, the properties under my jurisdiction, it was the custom to lock the safe at night." Upon defendant's motion the answer was stricken, but he was allowed over objection to answer a similar question to the same effect as to a general custom without making any showing that such custom was general among Chicago apartment hotels. And nothing was said about such hotels reopening such safes or vaults during the night for the convenience of tenants in such hotels who kept jewelry, etc. in deposit boxes in such safes or vaults. On cross-examination it clearly appeared that the witness did not know that such custom as he had testified to was a general one, but only that it was the custom or usage of those few

a General one, but only that it was the custom at night at their Inn
the visitors did not know that such customs as be had testified to was
such rules or vanish. On cross-examination it clearly appeared that
removed in such hotels as Lady Jamaica, etc. In defense it
Chicago department hotels. Lee nothing was said about such hotels
Upon redirect, Miss Lee was asked "Did you look the beds at night."
What do Interrogation, it was the custom to look the beds at night."
replied that he to "the proprietor I was associated with, the proprietor
explanation; he then was asked "And was that custom and usage?" He
department store, using looked it right?" Upon answering in the
department, with respect to the matter, wherein are contained safety
and description of the Illinois Coat and other boards of similar
and usage" in Chicago in the year 1920". In spite of the objection
making or claimed examination it be shown what was "the general custom
in other department hotels in Chicago (meaning stores). He then was
be had been night auditor in one department hotel and assistant manager
in the "retail business" in Chicago and also testified and that lately
that prior to engaging in that employment he had for 12 years been
testified in substance that he was the manager of a Chicago department
store in the year 1920. He
having the said Plaintiff's witness, T. E. Dyer, was
Ry. Co., 188 Ill. App. 80, 88.

<u>Peterson v. City Ry. Co.</u>, 125 Ill. App. 78; <u>Bennett v. Chatfield, etc.
Ass'n</u>, 219, 801. And as to the manner, and the means of <u>Olson v.</u>
<u>Chicago</u> 172 Ill. App. 189, 192; <u>Chicago, etc. R. R. Co. v. Dunn</u>, 23 Ill.
<u>R. Building</u>, 227 Ill. 9, 13; <u>Chicago Union Traction Co. v. Brown</u>,

hotels with which he had been associated. Defendant thereupon moved that the witness' testimony as to such general custom or usage be stricken, but the motion was denied. We think that the court erred in the ruling, in that under the issues framed the testimony was improper, misleading to the jury and prejudicial to defendant. (See, Turner v. Dawson, 30 Ill. 85, 86; Cleveland, etc. Ry. Co. v. Jenkins, 174 Ill. 398, 407-8.)

Other grounds are urged by defendant's counsel for a reversal of the judgment, viz, (a) error in admission of plaintiff's testimony as to the market value of her jewelry which she claimed was in her box in the vault at the time of the robbery; (b) error in admission of the testimony of plaintiff's witness, Bart, as to the condition of various boxes in defendant's vault just prior to the trial, which was more than two years after the occurrence of the robbery; and (c) prejudicial remarks of plaintiff's attorney during his closing argument to the jury. We, however, deem it unnecessary to discuss or decide these contentions.

For the reasons indicated the judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Kerner and Scanlan, JJ., concur.

35507

ALFRED E. STAPS,
Appellee,

v.

STATES IMPROVEMENT CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227

266 I.A. 596

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class tort action to recover damage to plaintiff's automobile caused by a collision in Ninety Fifth street at its intersection with Torrence avenue, Chicago, on the morning of November 1, 1930, there was a trial without a jury in the municipal court on July 10, 1931, resulting in a finding and judgment against defendant in the sum of $413.13. The present appeal followed.

On the trial plaintiff, a physician, testified in his own behalf, and Albert Munch, the driver of defendant's heavy truck, was called as its witness. Plaintiff introduced in evidence an itemized bill for repairs to his car, totaling $413.13, which after the accident were made by a reputable garage company and which bill plaintiff paid. Plaintiff also testified at length as to the damages done to his car by the collision, and that at his request said garage company had made the necessary repairs mentioned in the bill and in the ordinary course of business, which testimony was not disputed. Defendant's witness, Week, owner of an automobile repair shop, testified solely from an examination of the various items of the bill that in his opinion some of the charges for material and labor were fair and reasonable and others were not, and that the bill in its entirety was "in the neighborhood of 25% too high." Plaintiff's witness, Bolger, supervisor of a repair shop

35902

ATTORNEY'S NAME REDACTED

ATTORNEY FOR PLAINTIFF

266 I.A. 396

COURT OF CHANCERY.

Plaintiff,

v.

Defendant.

IN RE: [illegible] CO.,
a corporation,

Plaintiff.

RE: [illegible] THE [illegible] RESTAURANT [illegible] opinion of the court.

In a sub chapter that relies to recover damage to plain-
tiff's automobile caused by a collision in Grand Fork street at
the intersection with Potomac avenue, Chicago, on the morning of
November 1, 1921, there was a trial without a jury in the municipal
court on July 10, 1922, resulting in a finding and judgment against
defendant in the sum of $413.13. The present abpeal followed.

On the trial plaintiff, a physician, testified in his
own behalf, and Albert Moore, the driver of defendant's heavy
truck, was called as the witness. Plaintiff introduced in evidence
an itemized bill for repairs to his car, totaling $413.13, which
also the entries were made by a reputable garage company and which
bill plaintiff paid. Plaintiff also testified as to the amount
charged them to him for the collision, and that at his request
said garage company had made the necessary replacements in the
bill and in the ordinary course of business, which testimony was
not disputed. Defendant's witness, Dock, owner of an automobile
repair shop, testified briefly from an examination of the various
parts of the bill that in his opinion some of the charges for
material and labor were fair and reasonable and others not, and
that the bill in its entirety was "in the neighborhood of $[illegible] too
high." Plaintiff's witness, Bolger, superintendent of a repair shop

of a Chicago cab company, testified in rebuttal that all of the charges mentioned in the bill were in 1930, in Chicago, fair, reasonable and customary for repairs on the particular type of car in question.

As to the details of the collision the following facts appear in substance: Plaintiff, driving his car west in 95th street, and just entering its intersection with Torrence avenue (a north and south street), commenced to make a left turn to the south in Torrence avenue, but, because of a coal truck moving east in 95th street, he stopped his car, headed southerly at an angle, to allow the coal truck first to pass him. Immediately behind his car was a laundry truck which had also come to a stop. At the time, defendant's heavy truck was moving west on the north side of 95th street at a high rate of speed; it did not stop but crashed, head on, against the rear end of the standing laundry truck, which in turn violently struck the rear end of plaintiff's car, causing it suddenly to jumpforward; and its left front end crashed into the side of the passing coal truck, about in the middle, occasioning the damage complained of.

Defendant's counsel contends that the finding and judgment are contrary to the manifest weight of the evidence on the question of the negligence of the driver of defendant's truck. And it is argued that the accident was "unavoidable." We cannot agree with the contention or argument. The accident clearly was caused by the negligence of defendant's driver in approaching the intersection at a too high rate of speed under the circumstances, and in not having the truck under proper control.

Counsel also contends that the court erred in allowing plaintiff to testify as to a certain statement or declaration made to him by the driver of defendant's truck immediately after the accident. It appears that after plaintiff had alighted from his

of a Chicago cop somehow, terrified in temporary step all of the
spurious movements in the Gilt zone in 1980, in Chicago, East,
innocence and resentment for indexing on the particular style of car
in question.

So is the dreadle of the vanishing the Existential Limits
capture in appearance. Instantly, bringing him car away in 2000 miles,
and just existing the intersection with Tomorrow Avenue (a mostly and
empty street), commenced to make a half stone in the mouth to Tomorrow
Avenue, but, because of a very first moving east in Rock Street, he
stopped his car, headed southerly to go onto, to alter the next first
first to pass him. Immediately behind all car was a Jewelry Store
which had also come to a stop. In the time, Gilchrist's nearly brand
new sedation went on the south side of 2000 street at a high rate of
speed; it did not stop but crashed, head on, against the two and a
half floor and dropped into the middle of the passing cozy street, where
it did [illegible] on, coming it suddenly to [illegible] and its
one of [illegible]'s car, causing it suddenly to [illegible] and its
in the middle, necessitating the change contributed of.

Peterson's counsel contends that the fleeing and [illegible]
are contrary to the manifest weight of the evidence on the question
of the negligence of the driver of defendant's cause. And it is only
that the accident was [illegible]. To support those with the con-
tention on argument. The accident directly was caused by the negligence
of defendant's driver in approaching the intersection at a too high rate
of speed under the circumstance, and in not having the truck under
better control.

Counsel also contends that the court erred in giving
Plaintiff to Exhibit 2A of the Uniform Traffic
to give his driving privileges at an angle, to allow the next first
car to pass him. Immediately behind all car was a Jewelry Store
which had also come to a stop. In the time, Gilchrist's nearly brand
new sedation went on the south side of 2000 street at a high rate of
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half floor and dropped into the middle of the passing cozy street, where
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of defendant's driver in approaching the intersection at a too high rate
of speed under the circumstance, and in not having the truck under
better control.

Counsel also contends that the court erred in giving

car, following the collision, he immediately talked with said driver, who, according to plaintiff's testimony, in speaking concerning the cause of the accident, stated that the brakes of his truck were "on the bum". Even if it can be considered that such statement or declaration of defendant's agent was a mere narrative of a past transaction, not constituting a part of the res gestae, and not admissible against defendant (1 Greenleaf on Evidence, sec. 113; Baier v. Selke, 211 Ill. 512, 518; Lawndale Steam Dye Works v. Chicago Daily News Co., 189 Ill. App. 565, 566); still no error was committed by the trial court because no objection to the testimony, or motion to strike, was made by defendant on the trial. Furthermore, the declaration was not essential to make out plaintiff's case. The other testimony and the physical facts showed conclusively that the damage to plaintiff's car was caused solely by the negligence of defendant's driver in not having his truck under proper control, etc.

Counsel also contends that the court erred in admitting in evidence over objection the receipted bill of the garage company. Under plaintiff's testimony no error was committed by the court in this regard. There was nothing in the evidence to cast suspicion on the transaction between plaintiff and the garage company, and the repairs mentioned in the bill were necessary because of the damage done to plaintiff's car by the collision. The receipted bill was prima facie evidence of the reasonable cost to plaintiff of the repairs. (Cloyes v. Plastic, 231 Ill. App. 183, 191; Eyalos v. Matheson, 323 Ill. 269, 272; Finch v. Carlton, 249 Ill. App. 15, 18.) And under all the evidence we cannot say that the finding of the court was at all excessive.

For the reasons indicated the judgment of the municipal court should be and is affirmed. AFFIRMED.

Kerner and Scanlan, JJ., concur.

car, following the collision, he immediately talked with said driver, who, according to plaintiff's testimony, in speaking concerning the cause of the accident, stated that the brakes of his truck were "on the bum". Even if it can be considered that such statement or declaration of defendant's agent was a mere narrative of a past transaction, not constituting a part of the res gestae, and not admissible against defendant (1 Greenleaf on Evidence, sec. 113; Baker v. Inyan, 41 Ill. 318, 319; Cosgrift Pump Co. v. Phoenix Utility Pump Co., 150 Ill. App. 309, 312); still no error was committed by the trial court because no objection to the testimony or motion to strike was made by defendant on the trial. Furthermore, the declaration was not essential to make out plaintiff's case. The other testimony and the physical facts showed conclusively that the damage to plaintiff's car was caused solely by the negligence of defendant's driver in not having his truck under proper control, etc.

Counsel also contends that the court erred in admitting in evidence over objection the red-lined bill of the garage company. Under plaintiff's testimony no error was committed by the court in this regard. There was nothing in the evidence to cast suspicion on the transaction between plaintiff and the garage company, and the repairs mentioned in the bill were necessarily incident of the damage done to plaintiff's car by the collision. The reasonableness of the prices for the repairs mentioned in the bill was sufficiently proved by the testimony of plaintiff and the garage man. (Divoka v. Chmelik, 231 Ill. App. 349; Ill. Central R. Co. v. Hetherington, 209 Ill. 180, 272; Chicago & Western Ind. R. Co. v. Kerner and Company, 11 Ill. App. 10, 18.)

For the reasons indicated the judgment of the municipal court of Cook county is affirmed.

AFFIRMED.

35544

GERTRUDE E. PETERSON,
Appellant,

v.

S. W. STRAUS & COMPANY,
a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 597[1]

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced April 29, 1930, and tried without a jury during April, 1931, the court found the issues in defendant's favor and entered judgment for costs against plaintiff, who prosecutes the present appeal.

Plaintiff's declaration consisted of two special counts and the common counts. In the first special count she averred that, on July 11, 1927, she owned and possessed six bonds of the value of $1,000 each, theretofore purchased from defendant (a dealer in such securities); that in consideration that she would deliver to it the bonds and purchase other bonds from it for the same amount, it was agreed that defendant should obtain the money on the six bonds and reinvest it in other bonds, of like value and paying 6% interest per annum payable semi-annually, and deliver them to her within a reasonable time; that in accordance with the agreement she delivered the bonds on said date to defendant, and thereby it became liable to deliver to her other bonds of the value of $6,000; that shortly thereafter defendant delivered to her three other bonds of the value of $1,000 each, bearing such interest, etc.; that thereafter defendant paid to her semi-annual interest at said rate on the remaining $3,000, until the end of January, 1929, but failed and refused to deliver to her any bonds for said remaining $3,000, or to

2RG44

CLARKE S. ESTATES,
Appellant,

v.

S. J. CLARKE & COMPANY,
a corporation,
Appellee.

2RG 1.A. 397

BRIEF, FOR APPELLANT.

APPEAL FROM DISTRICT

No. PRESIDING JUSTICE STANLEY RETAINED THE OPINION OF THE COURT.

In an action in assumpsit, commenced April 20, 1920,
and tried without a jury during April, 1921, the court issued the
issues in defendant's favor and entered judgment for costs
against plaintiff, who prosecutes the instant writ.

Plaintiff's declaration consisted of two special counts
and the common counts. In the first special count the averred
that, on July 11, 1917, the owned and possessed six pounds of the
value of $7,000 each, thereafter purchased from defendant (a
dealer in such securities) that in consideration that she would
refiver to it the pounds and purchase other pounds from it for the
same amount, it was agreed that defendant should obtain the newly
on the six pounds and retained it in other pounds, of like value and
purpose of interest per annum including semi-annually, and deliver them
in ten eighth a reasonable time; that in accordance with the agreement
the delivered the pounds as said date to defendant, and thereby it
becomes liable to deliver to her other pounds of the value of $6,000;
that shortly thereafter defendant delivered to her FIFTY other pounds
of the value of $7,000 each, bearing such interest, etc.; that defen-
after defendant paid to her semi-annual interest at said rate on the
remaining $7,000, until the end of January, 1920, but failed and
refused to deliver to her said remaining $7,000, or to

pay said sum, or any part thereof; and that defendant is justly indebted to her in said sum of $3,000, together with interest thereon. The second special count is to the same effect. Defendant filed a plea of the general issue.

On the trial plaintiff, the owner and manager of a restaurant business at No. 952 Belmont avenue, Chicago, testified in her own behalf in substance as follows: One W. P. Doud was an agent and bond salesman of defendant. Commencing in 1921 plaintiff had purchased from defendant numerous bonds and had sold back some of them to it. All of these transactions had been conducted by Doud in defendant's behalf at her restaurant and she had confidence in him. On July 11, 1927, she there delivered to him six bonds, each of the value of $1,000, three secured by mortgage on the Burnham Building, Chicago, and three secured by mortgages on other buildings. They bore interest at 6% per annum, payable semi-annually. The agreement was that Doud would deliver them to defendant, procure from it six other bonds of equal value and bearing a like rate of interest and deliver them to her in exchange. On the day of the transaction he gave to her a receipt for the bonds on a printed form used by defendant (plaintiff's Exhibit 1) dated "7/11/1927," filled out in his handwriting and signed in defendant's name by "W. P. Doud." Shortly thereafter he delivered to her at the restaurant three bonds of equal value and bearing a like rate of interest, whichshe accepted. Although thereafter she purchased other bonds of defendant and had with it through Doud other unconnected business tranzactions, neither he nor defendant ever delivered to her the three remaining bonds, nor did either ever pay to her their value, $3,000, or any part thereof. She, however, received interest on the face value of the three undelivered bonds at the rate of 6% per annum "for eighteen months" (i.e. until about January 11, 1921.) These interest payments were for

pay said sum, or any part thereof, and that Delaware is jointly indebted to her in said sum of $3,000", together with interest thereon. The second special count is to the same effect. Defendant filed a plea of the general issue.

On the trial plaintiff, the owner and manager of a restaurant business at No. 982 Belmont avenue, Chicago, testified in her own behalf in substance as follows: One F. E. Long was an agent and bond salesman of defendant. Commencing in 1923 plaintiff had purchased from defendant numerous bonds and had sold such some of them to it. All of these transactions had been conducted by Long in defendant's behalf at her restaurant and she had confidence in him. On July 11, 1927, she there delivered to him six bonds, each of the value of $1,000, three secured by mortgage on the Gardner Building, Chicago, one there secured by mortgage on other buildings. They bore interest at 6% per annum, payable semi-annually. The agreement was that Long would deliver them to defendant, procure from it six other bonds of equal value and bearing a like rate of interest and deliver them to her in exchange. On the day of the transaction he gave to her a receipt for the bonds on a printed form saw by defendant (plaintiff's Exhibit 1) dated "7/11/1927," filled out in his handwriting and signed in defendant's name by "F. E. Long." Partly thereafter he delivered to her at the restaurant four bonds of equal value and bearing a like rate of interest, which she accepted. Although thereafter she purchased other bonds of defendant and had with it through Long other transactions, neither he nor defendant ever delivered to her the three remaining bonds, nor did either ever pay to her their value, $3,000, or any part thereof. She, however, received interest on the face value of the three delivered bonds at the rate of 6% per annum "for eighteen months" (i.e. until about January 11, 1929.) Those interest payments were for

~~These interest payments were for~~ $90 each, made semi-annually by defendant's checks, delivered to her by Doud, which were cashed by her. About "Thanksgiving time, 1923," (i.e., before the interest payments on the three undelivered bonds ceased) M. L. Straus, vice president of defendant, called upon her at the restaurant and said that defendant desired "to straighten out the matter of the six bonds" and suggested that she go to defendant's Chicago office, taking with her all of the bonds in her possession which she had purchased from defendant. A few days thereafter she did so and again met Straus, who examined the numerous bonds which she had brought with her. During the interview her transactions with Doud were discussed and, concerning the three bonds in question, Straus said he "was going to protect" her and that he thought it was "terrible". About two weeks later she had another conversation with Straus in defendant's office, during which "Doud was called in" and asked by Straus "if he had used any bonds - had cashed in the bonds, the $3,000, and Doud said 'Yes.'" Plaintiff further testified that the last time she saw Doud was "in the spring of 1930," when she talked with him regarding the three bonds; that Doud said that he "was sorry that he did it - sorry that he didn't make the business straight," that "he was going to get money and straighten it out," and that "he had take the three bonds" and "cashed them in for money by Straus."

Defendant's theory of defense on the trial in substance was, not that it had given back to plaintiff other bonds in place of the six owned and delivered by her to Doud for the purposes stated in July, 1927, but that, as to the three bonds not given back, there had been a settlement as to their face value, $3,000, by virtue of other transactions between the parties. On the trial defendant's attorney admitted that defendant "got the six one thousand dollar bonds," which plaintiff had given to Doud, and it was not disputed

that plaintiff had received back from defendant through Doud three one thousand dollar bonds. Defendant's counsel state in their printed brief here filed that the issue was and is "what occurred with the proceeds of the other three bonds." As we regard it, defendant's defense amounted to that of payment of such proceeds to plaintiff. It is well settled that the burden of establishing such a defense is upon the party making it. (48 Corpus Juris, p. 680, sec. 176; U. S. Wringer Co. v. Cooney, 214 Ill. 520, 526; Douglas v. Pfeiffer, 46 id. 102, 106.) Defendant's only witness to establish this defense was F. C. Braeutigan, its accountant and assistant treasurer, and in charge of its records, papers, etc. He identified a mass of written instruments, records, bond sales' tickets, etc. in possession of defendant, including a few of its checks payable to plaintiff, which it appeared she had cashed, and certain copies of notes, the originals of which were claimed to have been signed by her. The witness apparently did not know anything about these records, etc. except that they were a part of defendant's records and files; nor did he know that plaintiff had in fact ever signed any notes payable to defendant. The court allowed photostatic copies of all of the instruments to be introduced in evidence. Reliance is placed on a certain undated paper, Defendant's Exhibit 21, being a claimed statement of account with plaintiff, showing a debit item as against defendant of $3141.24 and interest of $3.05, making a total of $3144.29, and three credit items aggregating the same total, viz, a credit "B. Rec." of $2237.50, a credit of "cash" paid to plaintiff $821.80, and a credit by check, to "balance" account, of $84.99. In addition to this paper there was introduced in evidence defendant's paid check for $84.99, dated July 15, 1927, payable to plaintiff's order and endorsed by her. It is to be noticed that this date is about a year and a half prior to January, 1929, during all of which

upon a law and a half prior to January, 1980, owning all of which were endorsed by her. It is to be noticed that this date is paid check for $84.80, dated July 13, 1983, payable to plaintiff's in addition to this border sheets was introduced in evidence defendant's credit "3, Dec." of $8837.80, a credit of "cash" paid to Plaintiff ($1.80, and a credit by "Purchase" accounts, of $84.80. ($1744.80, one three credit items aggregating the sum total, viz, a defendant of $1741.84 and interest of $2.06, making a total of statement of account with plaintiff, showing a debit item as against on a certain envelope paper, Defendant's Exhibit 31, being a plaintiff of the instruments to be introduced in evidence. Defendant is placed pamphlet to defendant. The court allowed photostatic copies of all her did he know that plaintiff had in fact ever signed any notes etc. enough that they were a part of defendant's records and files. The witness apparently did not know anything about these transactions, the originals of which were claimed to have been signed by plaintiff, which it appeared she had sought, upon certain pretext of borrowing of defendant, including a list of the church pamphlet to a dress of certain instruments, records, bond safes, stocks, etc. exhibited, and in charge of its records, papers, etc. To identify this defendant one M. C. Greenlaw, its accountant and assistant treasurer, and in charge of its records, papers, etc. To identify Plaintiff's 46 to 48, 102, 106.) Defendant's only witness to establish a defense is upon the party making it. (12 Corpus Juris, p. 880, 886. 1741; p. 6. Pittmar Co. v. Cooper, 214 Ill. 880, West Chicago R. R. Co. v. Dreyer, 176 Ill. 267, 52 N. E. 1000.) Defendant's only witness to establish this defense was M. C. Greenlaw, its accountant and assistant treasurer, and in charge of its records, papers, etc. To identify a dress of certain instruments, records, bond safes, stocks, etc. in possession of defendant, including a list of the church pamphlet, which it appeared she had sought, upon certain pretext of notes, the originals of which were claimed to have been signed by her. The witness apparently did not know anything about these transactions, enough that they were a part of defendant's records and files, nor did he know that plaintiff had in fact ever signed any notes pamphlet to defendant. The court allowed photostatic copies of all of the instruments to be introduced in evidence. Defendant is placed on a certain envelope paper, Defendant's Exhibit 31, being a statement of account with Plaintiff, showing a debit item as against a credit "3, Dec." of $8837.80, a credit of "cash" paid to Plaintiff ($1744.80, one three credit items aggregating the sum total, viz, a defendant of $1741.84 and interest of $2.06, making a total of $1744.80, and a credit by "Purchase" accounts, of $84.80. In addition to this border sheets was introduced in evidence defendant's bond check for $84.80, dated July 13, 1983, payable to plaintiff's order and endorsed by her. It is to be noticed that this date is upon a law and a half prior to January, 1980, owning all of which

intervening time, according to plaintiff's undisputed testimony, she received defendant's interest checks of $90, being semi-annual interest for the three bonds in question. Plaintiff admitted having received and cashed the check for $84.99, but stated that it was for certain interest or a dividend due to her. On the photostatic copy of it nothing appears that would indicate that it was forwarded to her in settlement of any balance of any account. As to the cash item of $821.80, Braucetigan testified that defendant "had no receipt" from plaintiff for the amount, and that he did not know whether Doud or anyone else had paid said amount to her. Plaintiff denied receiving said sum in cash. Other defendant's exhibits relate to two transactions, had prior to the time plaintiff delivered the six bonds to Doud in July, 1927, viz, (1) a sale to plaintiff on June 30, 1925, of certain bonds, secured by mortgage on the Hearst-Brisbane Building and another building, - the sale price, including accrued interest, being $10,037.34 and (2) a sale to plaintiff on July 13, 1926, of certain other bonds, secured by mortgage on the Chicago Builder's Building, - the sale price, including accrued interest, being $5013.33. Other exhibits purport to be copies of notes made by plaintiff payable to defendant for moneys due from time to time on certain transactions.

Defendant did not call M. L. Straus as a witness and no reason for not calling him was shown. Nor did it produce Doud as a witness; nor does it appear that it made any attempts to do so, or that he could not be found. Braeutigan testified that Doud was "not now" in defendant's employ and that he did not know his present whereabouts. As it appears that all business transactions for a number of years between the parties, as well as the particular transaction involving the three bonds, were conducted solely by Doud as defendant's authorized agent, the failure of defendant to

produce Doud as a witness, or to account for his absence, leads to the presumption or inference that his testimony, if given, would not have aided defendant in its defense. (Chicago, etc. R. Co. v. Newell, 113 Ill. App. 263, 268; Warth v. Loewenstein & Sons, 219 Ill. 222, 226; Pipal v. Grand Trunk etc. Ry. Co., 341 Ill. 320, 327.)

In rebuttal plaintiff introduced in evidence two other exhibits (Pltf's Ex. 2 and 3) of which photostatic copies are in the present transcript. One is defendant's original sale memorandum of the Hearst-Brisbane and other bonds, dated June 30, 1925, and delivered to her by Doud at the time. The instrument is covered with various figures made by Doud, showing payments in cash to him, for defendant, from time to time made by her. The last cash payment made by her is $1,000, on June 29, 1926, at which time Doud wrote at the bottom "Paid 6/29/26, W. P. Doud." Plaintiff's exhibit 3 is defendant's original sale memorandum, dated July 13, 1926, of the Chicago Builder's Building bonds. The instrument is covered with similar figures made by Doud and discloses that the last cash payment to him, for defendant, was for the balance due of $646.26, and made on July 14, 1927, and across the face of the instrument are the words "Paid, S. W. Straus & Co., by W. P. Doud." This final payment for these particular bonds was made three days after Doud received the bonds involved in the present suit. Plaintiff further testified that in all she had purchased of defendant, through Doud, from time to time, about $50,000 worth of bonds; that she never gave any checks for the bonds purchased, but always paid for them in cash installments given from time to time to Doud, at her restaurant; that she never received any bonds until they were fully paid for; and that she never was in defendant's office until she there had her first conversation with M. L. Straus shortly after Thanksgiving Day in 1928.

Plaintiff's counsel contends that the court erred in entering the judgment against plaintiff because defendant failed to maintain the burden of establishing its affirmative defense of payment and because the court's finding in defendant's favor is against the manifest weight of the evidence. And counsel states in his brief that the clear inference to be drawn from all the evidence is that Boud (defendant's agent) converted to his own use considerable of the cash money that he received from time to time from plaintiff; that at times he would turn over to defendant all of the cash received; that at other times he would only turn over a part of it, retaining for his own use the other part; that at other times he would retain the full amount of the cash received; and that at still other times, in the endeavor to cover particular shortages, he would turn over to defendant more cash than he at the particular time received from plaintiff. After a careful consideration of all the evidence we agree with counsel's contention and statements, and are of the opinion that the judgment appealed from should be reversed and that judgment should be entered here against defendant for $3,000, together with interest on said sum at the rate of 5 per cent per annum from January 31, 1929. Accordingly, the judgment against plaintiff is reversed and judgment will be entered here, with findings of facts, against defendant, S. W. Straus & Company, for $3,000, together with interest thereon from January 31, 1929, at said rate, which amount of interest the clerk will compute.

REVERSED WITH FINDINGS OF FACTS, AND JUDGMENT HERE AGAINST DEFENDANT FOR $3,000 AND SUCH INTEREST.

Kerner and Scanlan, JJ., concur.

35544.

FINDINGS OF FACT.

We find as facts in this case that on July 11, 1927, plaintiff delivered to defendant, S. W. Straus & Company, six bonds of the value of $1,000 each, for exchange for six other bonds of equal value to be delivered to her; that shortly thereafter she received from defendant and accepted three such bonds; that defendant did not deliver to her the remaining three such bonds, but for a time and until January 31, 1929, paid to her semi-annual interest on the same, when payment of interest ceased; that defendant, although often requested, has never delivered to her said three remaining bonds, or paid to her the value thereof, $3,000; and that defendant is justly indebted to plaintiff in the sum of $3,000; together with interest at the rate of 6 per cent per annum from January 31, 1929.

Exchange of Stock.

We find no facts in this case that on July 17, 1927,
plaintiff delivered to defendant, c. O. Strong & Company, six eight
hundred of common value of $7,500 each, for exchange for six eight
hundred of equal value to be delivered to him; that shortly thereafter
she received from defendant six counterfeit shares each reading that
defendant did not deliver to her the remaining three such shares,
but for a time and until January 27, 1928, paid to her semi-
annual interest on the same, when payment of interest ceased;
that defendant, although often requested, has never delivered to
her said three remaining shares, or paid to her the value thereof,
$7,500; and that defendant is justly indebted to plaintiff in the
sum of $22,500; together with interest at the rate of 6 per cent
per annum from January 17, 1928.

35830

UNION BANK OF CHICAGO,
Complainant and Appellee,

v.

BERNARD C. MALTER et al.,
Defendants.

ON APPEAL OF BERNARD C. MALTER,
Appellant.

24 A7

APPEAL FROM INTERLOCUTORY ORDER OF SUPERIOR COURT, COOK COUNTY, APPOINTING A RECEIVER.

266 I.A. 597

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Bernard C. Malter from an interlocutory order of the superior court of Cook county, entered November 28, 1931, appointing a receiver of certain improved premises in Chicago in a foreclosure proceeding, commenced on November 13, 1931, by the Union Bank of Chicago, as trustee.

In the order, after reciting that the cause came on to be heard on complainant's motion for the appointment of a receiver and that it appeared to the court that said Malter had duly been notified of the motion and that the court had read the sworn bill of complaint, it is ordered (1) that Howard M. Goodspeed be and is hereby appointed receiver of the premises, and that he file a bond as such in the sum of $5,000; (2) that complainant file a bond in the sum of $300; (3) that the receiver be authorized to take immediate possession of the premises and of the buildings thereon, "together with all rents, issues and profits, with all the rights, powers and duties of a receiver in chancery," etc.; and (4) that all tenants and occupants of the building attorn to such receiver and pay rent to him. No findings of fact are contained in the order, and from it Malter duly took an appeal by filing with the clerk of

CHICAGO BANK OF COMMERCE,
Complainant and Appellee,

v.

ERNEST E. MAILEY et al.,
Defendants.

ON APPEAL OF ERNEST E. MAILEY,
Appellant.

Appeal from Superior Court of Cook County.

This is an appeal by Ernest E. Mailey from an interlocutory order of the Superior Court of Cook County, entered November 18, 1921, appointing a receiver of certain improved premises in Chicago in a foreclosure proceeding, commenced on November 12, 1921, by the Union Bank of Chicago, as trustee.

In the order, after reciting that the cause came on to be heard on complainant's motion for the appointment of a receiver and that it appears to the court that said Mailey had duly been notified of the motion and that the court had read the motion papers of complaint, it is ordered (1) that Howard E. Coonley be and is hereby appointed receiver of the premises, and that he file a bond in the sum of $5,000; (2) that complainant file a bond in the sum of $500; (3) that the receiver be authorized to take immediate possession of the premises and of the building thereon, together with all rents, issues and profits, with all the rights, powers and duties of a receiver in chancery," etc.; and (4) that all

266 I.A. 397

the superior court a bond, approved by said clerk, on December 15, 1931, as provided by section 123 of the Practice Act; and the transcript of the record was here filed on January 26, 1932, within apt time. The transcript does not disclose, however, that complainant had filed in the superior court a complainant's bond in the sum of $300, or that the receiver had filed a receiver's bond in the sum of $5,000, or that he had taken possession of the premises.

In the bill, sworn to by an agent of complainant, it is alleged that on November 19, 1928, Max Malter and Fannie, his wife, executed and delivered 87 bonds, - 20 being for $100 each, 38 for $500 each, and 29 for $1,000 each, payable at different times (some 5 years after date and others at prior times) with 6 per cent interest before maturity and 7 per cent thereafter; that to secure the bonds they conveyed and mortgaged the premises by their trust deed (recorded December 6, 1928) to complainant as trustee, "together with all the rents, issues and profits that may hereafter accrue from the premises," a copy of which trust deed is attached to the bill and made a part thereof; that six of the bonds were paid at maturity and cancelled; that the interest coupons attached to bonds numbered 7 to 87, evidencing semi-annual installments of interest falling due on May 19, 1931, in the sum of $1410, were not then paid, but that the sum of $500 has since been paid on said interest; that bonds numbered 7 to 9 in the principal sum of $500 each, falling due on May 19, 1931, were not paid; and that the defaults in the payments of said principal and interest have continued for more than 20 days.

Complainant further alleged that the trust deed provides in part, in case the default in payment of principal or interest of said bonds continues for 20 days, that at the option of the holder of any unpaid bonds the entire principal sum, together with

the auspices under a bond, effected by mail order, on December 19, 1923, as provided by section 3 of the Gazette Act; and the treasurer of the record has been filed on January 7th, 1922, within ept thereof. The township does not disclose, however, that compliance had filed in the superior court a complainant's bond in the sum of $500, as that he had taken possession of the premises.

In the bill, which is by no means of complainant, it is alleged that on November 19, 1923, Ben Miller and Amelia, his wife, executed and delivered 87 bonds, - 50 being for $1,000 each, 38 for $500 each, and 39 for $1,000 each, payable at different times (some 3 years after date and others at later times) with a per cent interest before maturity and 7 per cent thereafter; that to secure the bonds they pledged and mortgaged the premises by first-first deed (recorded December 6, 1923) to complainant as trustee, "together with all the rents, issues and profits that may thereafter accrue from the premises." A copy of which deed is appended to the bill and made a part thereof; that six of the bonds were duly and regularly indorsed; that the interest coupons affixed to bonds numbered 7 to 87, inclusive, semi-annual payments of interest falling due on May 19, 1923, in the sum of $1910. were not then paid, but that the sum of $500 has since been paid on said interest; that bonds numbered 1 to 6 in the principal sum of $300 each, falling due on May 19, 1923, were not paid; and that the defendants in the premises and interest have continued for more than 30 days.

Complainant further alleges that the trust deed provides in part, in case the default in payment of principal or interest

interest, shall at once and without notice become due and payable; and that the trustee, in lieu of or in addition to the right of entry given him, may, and upon the written request of the holder of any one or more of the outstanding bonds and upon being indemnified to its satisfaction, shall, in case of such default, cause the trust deed to be foreclosed and the mortgaged property sold.

Complainant further alleged that by reason of said defaults, and complainant having received the written request of the holder of some of the outstanding bonds, it has elected to foreclose the lien of the trust deed for the use and benefit of all of the holders of the bonds and coupons; that there is now due to complainant for the use and benefit of said holders the sum of $2410, with interest; that by the terms of the trust deed the rents, issues and profits are expressly assigned as security for the principal indebtedness and interest; and that the trust deed further provides that, upon the filing of any bill to foreclose, the court may appoint a receiver, either before or after sale, without notice to the mortgagors or their assigns and without regard to the solvency or insolvency of the person or persons liable for the payment of the indebtedness and without regard to the then value of the premises, which receiver shall have full power to collect the rents, issues and profits of the premises during the pendency of the foreclosure and, in case of a sale and a deficiency, during the statutory period of redemption.

Complainant further alleged that the premises sought to be foreclosed are located at 3339-41 Douglas boulevard, Chicago; that they consist of a 3-story and basement brick building, containing 12 apartments; that "the building is in need of repairs;" that the real estate in its present condition "affords scant security for the indebtedness secured by said trust deed;" and that "unless a receiver is appointed the lien of your orator will be wasted and impaired and

may be wholly lost."

Complainant further alleged upon information and belief that the record owner of the fee simple title to the premises is Bernard C. Malter, but that his right, title or interest in the premises is subject and inferior to the lien of the trust deed. (Other incumbrances are set forth; also the names of certain parties having or claiming to have interests in the premises.) The bill prayed for an accounting, a foreclosure and the appointment of a receiver pendente lite.

On November 24, 1931, Bernard C. Malter and Fannie Malter filed a demurrer to that part of the bill that concerned the appointment of a receiver pendente lite. After quoting the paragraph of the bill, in which it is alleged that "the building is in need of repairs" and that the real estate "affords scant security for the indebtedness secured by said trust deed," they showed, for cause of demurrer, that said paragraph "pleads merely conclusions and does not set forth the facts upon which this court may conclude that the building is scant security for the indebtedness or that the premises are in need of repairs."

On November 24, 1931, also, the two defendants filed an answer to the bill, in which they admitted the execution and delivery of the 87 bonds and of the trust deed securing them, also the non-payment of bonds, Nos. 7 to 9, for $500 each, at the maturity thereof, on May 19, 1931. But defendants alleged that "the payment of said bonds, Nos. 7 to 9, was extended by endorsement on the bonds to November 19, 1931, and that, at the time of the filing of complainant's bill on November 13, 1931, said bonds were not due under and by virtue of the terms of said extension." And defendants denied that default in the payment of principal and interest "has continued for a period of more than 20 days," denied that complainant has re-

may be wholly lost."

Complainants further alleged upon information and belief that the record owner of the fee simple title to the premises in Bernard C. Meltzer, but that his right, title or interest in the premises is subject and inferior to the lien of the trust deed. (Other inconsistencies are set forth also the names of certain parties having or claiming to have interests in the premises.) The bill prayed for an accounting, a foreclosure and the appointment of a receiver pendente lite.

On November 24, 1933, Bernard C. Meltzer and Vernie Meltzer filed a demurrer to that part of the bill which concerned the appointment of a receiver pendente lite. After quoting the paragraph of the bill, in which it is alleged that "the building is in need of repairs" and that the said estate "affords ample security for the indebtedness secured by said trust deed," they observe, for cause of demurrer, that said paragraph "pleads merely conclusions and does not set forth the facts upon which this court may conclude that the building is ample security for the indebtedness or that the premises are in need of repairs."

On November 24, 1933, also, the two defendants filed an answer to the bill, in which they admitted the execution and delivery of the $7 bonds and of the trust deed securing them, also the maturity of the $7 bonds and of the trust deed securing them, also the payment of bonds, Nos. 7 to 9, for $500 each, as the maturity thereof, on July 19, 1931. But defendants alleged that "the payment of said bonds, Nos. 7 to 9, was extended by agreement on the bonds to November 19, 1931, and that, at the time of the filing of complainant's bill on November 13, 1933, said bonds were not due under and by virtue of the terms of said extension." And defendants denied that default in the payment of principal and interest "has continued for a period of more than 30 days," denied that complainant has re-

ceived written request of the holder of some of the outstanding bonds, and denied that there is due on the indebtedness the sum of $2,410, and alleged the fact to be that only $910 was due at the time complainant's bill was filed. And defendants further denied that complainant was entitled to the appointment of a receiver pendente lite "unless the premises are in fact not sufficient security for the indebtedness being foreclosed," and alleged that "the premises involved are sufficient security for the sum of money herein alleged to be due and upon which foreclosure is sought."

On the same day that the order appointing the receiver was entered (November 28, 1931) the court overruled "the demurrer filed to that part of the bill for the appointment of a receiver" to which ruling the defendants objected.

On January 11, 1932, after notice to complainant's solicitors, defendant, Bernard C. Malter, filed his praecipe for a record and a transcript was made up and certified to by the clerk under his hand and the seal of the court on January 16, 1932. This transcript was filed in this appellate court, as before stated, on January 26, 1932. It does not contain a certificate of evidence.

On January 27, 1932, a so-called "additional record" was filed in this court by appellee. It is duly certified to by the clerk of the superior court under date of January 21, 1932. It appears therefrom that on January 13, 1932, the superior court entered "an order amending the order entered November 28, 1931, nunc pro tunc as of November 28, 1931." On the same day (January 13, 1932) the superior court further ordered, on motion of complainant's solicitor, that "said amended order be made a part of the record as of November 28, 1931." The nunc pro tunc order is in part as follows:

"This cause coming on to be heard upon the motion of complainant * * for an order for the appointment of a receiver,

complainant" - for an order for the apprehension of a receiver, follows:

"Only cases cognizable as to be heard upon the motion of plaintiff or of November 30, 1932." The next pro rata order is to bear an interest, that "said amended order be made a part of the present bill of complainant," and denied that there is due to the complainant the sum of $3,420, and alleged the fact to be that only $420 was due of the said complainant's bill was filed. And defendants further denied that complainant was entitled to the appointment of a receiver pendente lite "unless the premises did on such day, sufficient security for the indebtedness being incurred," and alleged that "the premises involved [the building] [illegible] for the sum of money proper alleged it to be due and upon which foreclosure is sought."

On the same day that the order appointing the receiver was entered (December 28, 1932) the court entered "the decree filed in that part of the bill for the appointment of a receiver" to which refers the reference application.

On January 11, 1933, after notice to complainant's solicitor, defendant, Herbert O. Meiser, filed his petition for a writ and a temporary one made up and certified to by the clerk under the seal of the court on January 14, 1933. This temporary was filed in this objective court, as before stated, on January 16, 1933. It does not contain a verification of reference.

On January 17, 1933, a so-called "additional record" was filed in this court by appellee. It is duly certified to by the clerk of the superior court under date of January 17, 1933. It appears therefrom that on January 12, 1933, the superior court entered "an order annulling the order entered November 30, 1932" nunc pro tunc as of November 28, 1932." On the same day (January 12, 1933) the superior court further ordered, on motion of complainant's solicitor, that "said amended order be made a part of the record

and it appearing that defendant, Bernard C. Malter has been duly notified of this motion and the entry of this order, and the court having read the sworn bill of complaint and heard the testimony of Howard M. Goodspeed, and received a report of an appraiser sent out by the court to investigate the present value of the premises, * * and being fully advised, the court finds that the present fair market value of said real estate described in the bill does not exceed $45,000, that the general taxes for the year 1929 are unpaid, and that the premises constitute insufficient and inadequate security for the payment of the first mortgage bonds and interest thereon, described in the bill.

IT IS ORDERED * * that Howard M. Goodspeed be and he is hereby appointed receiver of the premises * * and that the receiver file a bond in the sum of $5,000, and * * that complainant file a bond in the sum of $300.

IT IS FURTHER ORDERED that said receiver be authorized to take and have immediate possession of the premises * * together with all rents, issues and profits thereof, with all the rights, powers and duties of a receiver in chancery, etc." (Here follows language as to his powers and duties, and as to all tenants attorning to him, - substantially the same as in the original order appealed from.)

Subsequently appellant here moved to strike said so-called additional record. The motion was accompanied by written suggestions to which counter suggestions were filed. The motion was reserved to the hearing, and will first be considered.

We believe it to be the law in Illinois and elsewhere that an order entered nunc pro tunc should be justified by the record. The additional record in the present cause contains the nunc pro tunc order appointing Mr. Goodspeed as receiver of the premises and defining his powers and duties, and another order directing that said order be made a part of the record as of November 28, 1931. There are certain findings of the court not contained in the original order of November 28, 1931, but there are no findings justifying its entry as a nunc pro tunc order, nor is there any minute, memorial or testimony, contained in any certificate of evidence justifying such entry. In Lindauer v. Pease, 192 Ill. 456, 459, it is said: "The office of an order nunc pro tunc is only to supply some omission in the record of an order which was really made but omitted from the record. If an order is actually made

by the court but there is a failure to enter it, the court may correct the mistake in failing to enter the order, and make the record show the order which the court actually made as of the time it was made. No court has a right to create an order by that method or to supply an order which was never in fact made. A nunc pro tunc order cannot be made to supply an omission to make an order, but only an omission in the record of the order." This language is quoted with approval in People v. Rosenwald, 266 Ill. 548, 554, where it is said: "To the same effect see Stein v. Meyers, 253 Ill. 199 (205). And where there is no minute or memorial paper in the records to show that the order was, in fact, made, it cannot, under these decisions, be so entered. This rule in this State is in accord with the weight of the authority in other jurisdictions." (See, also, Benton Coal Co. v. Industrial Commission, 321 Ill. 208, 211.) And we believe it is also the law that the burden of sustaining the validity of a nunc pro tunc order is upon the party who causes it to be entered, and that no presumption in favor of its validity is to be indulged in. In Berg v. Berg, 223 Ill. 209, 210-1, it is said: "In chancery cases the practice is well settled in this State that the party, in whose favor a decree granting relief is entered, to maintain it must in some way preserve the evidence, by a certificate of evidence or otherwise, or the decree must find the specific facts that were proven on the hearing, and that it is not the duty of the party against whom the decree is rendered thus to preserve the evidence. No presumption will be entertained that evidence sufficient to sustain the decree, not appearing in the record, was heard, and if the evidence is not thus properly preserved the decree will be reversed upon appeal." (See, also Timke v. Allen, 225 id. 402, 403; Ohman v. Ohman, 233 id. 632, 633; Anderson v. Anderson, 339 id. 400, 408.)

by the court but there is a failure to enter it, the court may correct the mistake in failing to enter the order, and make the record show the order which the court actually made as of the time it was made. No court has a right to create an order by that method or to supply an order which was never in fact made. A nunc pro tunc order cannot be made to supply an omission to make an order, but only an omission in the record of the order.' This language is quoted with approval in People v. Reynolds, 286 Ill. 248, 254, where it is said: "To the same effect see Gibb v. Hazen, 252 Ill. 199 (200). And where there is no minute or memorial paper in the records to show that the order was, in fact, made, it cannot, under these decisions, be so entered. This rule in this State is in accord with the weight of the authority in other jurisdictions." (See, also, Boston Coal Co. v. Industrial Commission, 302 Ill. 208, 211.) And we believe it is also the law that the burden of sustaining the validity of a nunc pro tunc order is upon the party who causes it to be entered, and that no presumption in favor of its validity is to be indulged in. In Ross v. Ross, 259 Ill. 208, 210-1, it is said: "In chancery cases the practice is well settled in this State that the party, in whose favor a decree granting relief is entered, to maintain it must in some way preserve the evidence, by a certificate of evidence or otherwise, or the decree must find the specific facts that were proven on the hearing, and that it is not the duty of the party against whom the decree is rendered thus to preserve the evidence. No presumption will be entertained that evidence sufficient to sustain the decree, not appearing in the record, was heard, and if the evidence is not thus properly preserved the decree will be reversed upon appeal." (See, also Clark v. Allen, 258 id. 210, 208; Olsen v. Olsen, 233 id. 190, 435; Anderson v. Anderson, 229 id. 400, 403.)

But counsel for complainant contend in substance that the original order of November 18, 1931, is an interlocutory one, and, the main cause being still pending, such order may be amended or corrected by the court, even though the term at which it was entered has passed. And counsel, in support of their contention, cite the cases of Coughran v. Gutcheus, 18 Ill. 390, 391; Brush v. Seguin, 24 Ill. 254, 255-6; Cairo, etc. R. Co. v. Holbrook, 72 Ill. 419, 422; Campbell v. Powers, 139 Ill. 128, 135; Chicago, etc. R. Co. v. Harrington, 192 Ill. 9, 17; Shaw v. Norris, 290 Ill. 196, 204; Cook v. City of Marseilles, 139 Ill. App. 536, 539-40. An examination of these cases discloses, however, that the interlocutory order (which was afterwards amended or corrected) was one which concerned pleadings or one from which no appeal could be taken or allowed. We do not think that the rules enunciated in these cases should be applied to the present case, where the interlocutory order is the appointment of a receiver of defendant's premises, and from which the statute (section 123 Practice Act) allows an appeal to the appellate court, provided "that such appeal is taken within thirty days from the entry of such interlocutory order or decree," etc., and the party taking such appeal "shall give bond, to be approved by the clerk of the court below, to secure costs in the appellate court." If, after a circuit court or the superior court of Cook county has entered an interlocutory order appointing a receiver pendente lite, and after a defendant affected by the order has duly taken an appeal therefrom in accordance with the statute (which he must take within the time prescribed to have the order reviewed), such court can amend, correct or modify such interlocutory order by the entry of a nunc pro tunc order, our interlocutory appeal statute would be rendered nugatory. And we do not think that the jurisdiction, conferred upon appellate courts by said statute, can properly be

But counsel for respondent contend in substance that the original words of Sections 28, 1933, in an Interstate Act, and, the main clause being still pending, such order may be removed or collected by the court, even though the date at which it was entered has passed. (And counsel, in support of this contention, cite the cases of Lumbering v. Petersburg, 12 111. 384; Bond v. Bennin, 24 111. 384, 386-8; Dodge, etc. Co. v. Whitcomb, 28 111. 419, 422; Campbell v. Bowers, 140 111. 128, 134; Chicago, etc. R. Co. v. Purrington, 128 111. 9, 17; Dana v. Dana, 40 111. 394; Cook v. City of Pekin, 120 111. App. 634, 638-40. In examination of these cases however, we find the intervening cases (which were affirmed or reversed) not one which concerned pleadings or one from which no appeal could be taken or filed. We do not think that the rules enunciated in these cases should be applied to the present case, where the intervention under is the appointment of a receiver of defendant's property, and from which the statute (section 123 Practice Act) allows an appeal by the appellant alone, providing "that such appeal is taken within days from the entry of such interlocutory order or decree." etc., and the party taking such appeal "shall give bond, to be approved by the clerk of the court below, to secure costs in the appellate court." If, after a circuit court or the superior court of Cook county has entered an interlocutory order appointing a receiver pendente lite, and after a defendant affected by the order has duly taken an appeal therefrom in accordance with the statute (which he must take within the time prescribed to make the order valid), such court can annul, correct or modify such interlocutory order by the entry of a nunc pro tunc order, our interlocutory appeal stands merely as a

affected by the entry of any such, or other, nunc pro tunc order. In the interlocutory appeal case of Mechanics, etc. Association v. People, 72 Ill. App. 160, it appears that receivers had been appointed by order of the circuit court of Cook county, that an appeal from the order had been perfected in the appellate court for this district, and that a motion had been made in the appellate court to dismiss the appeal, "based upon two orders of the circuit court entered after the perfecting of the appeal." In denying the motion to dismiss the appeal, the court said (p. 170):

"By one of these orders the appeal bond given upon this appeal was ordered stricken from the files of the circuit court; by the other order, so called 'permanent receivers pendente lite' were appointed in lieu of the receivers whose appointment is the subject matter of this appeal.

As to the first order, it is enough to say that the circuit court had no power, after this appeal had been perfected by filing bond with the clerk as required by statute, to in any manner affect the jurisdiction of this court upon such appeal by anyorder it might enter. No approval by the court of the appeal bond taken by the clerk was necessary; neither had the court any power to pass upon its sufficiency or strike it from the files. * *

As to the effect of the latter order appointing other receivers in lieu of the ones whose appointment is here in question, the only appeal which could avail appellant was from the first order, viz, the one here appealed from. No subsequent interlocutory order substituting other receivers for the ones first appointed could be reviewed here on appeal. * *

Nor could such interlocutory order of substitution deprive appellant of its right of appeal, whether the receivers thus substituted be called merely temporary receivers or 'permanent receivers pendente lite.'"

In Reynolds v. Perry, 11 Ill. 534, 535, it is said: "It is not the filing of the record by the appellant which gives this court (Supreme) jurisdiction of an appeal. The case is, in contemplation of law, pending in this court the moment the appeal bond is executed and filed with the clerk of the circuit court." (See, also, Merrifield v. Cottage Piano Co., 238 Ill. 526, 532.) In Dobrinsky v. Boylan, 222 Ill. App. 494, 496, it is decided in substance that, under section 123 of the Practice Act, a bond in proper form, approved by the clerk and filed within 30 days from the date of the entry of an order granting a temporary injunction, per-

date of the writ of an order dismissing a temporary injunction, bar-
ber [sic] effected by the stock not filed within 30 days from the
[illegible] that [illegible] section 163 of the Practice Act a party in
Thurlough v. Dolphin, 188 Ill. 434, 441, it is declared in sup-
plementary proceedings, Barrickman v. Citizens State Bk., 222 Ill. 234, 238, 239.) In
it appeared and filed with the clerk of the circuit court." (Sec.
cription of Jan. pending in BK. court the amount the appeal must
count (Supreme) Injunction of an appeal. The case is, in con-
is not the filing of the record by the appellant which gives this
In Kavanagh v. Zarky, 11 Ill. App. 139, it is said: "It
necessary Bankruptcy Act.
supplanting other remedies for the same first appointed could be
restrained case on appeal. * *
For could such injunctory order of application
[illegible] the rights of appeal, whether the remedies
[illegible] appellant and from the first court,
ate." the one here appealed from. An appointment interlocutory order
the only appeal which could avail appellant was from the first court,
receivers in lieu of the court which appointed to pass in question,
As to the effect of the Judge over objecting after
[illegible] the sufficiency or strike it from the files. * *
[illegible] case; neither had the court any power to
it might enter. To dismissal of the court of the appeal made taken
[illegible] the jurisdiction of this court upon appeal by objector
filing bond with the clerk as required by statute, is in any manner
and no power, after writ appeal had been perfected by
to the first court, it is enough to say that the sit-
ject matter of this appeal.
ought [illegible] in lieu of the receivers which [illegible] in the
by the other order, to [illegible] 'permanent receivers Bankruptcy Life'
[illegible] with [illegible] the filing of the circuit court
[illegible] one of those orders the appeal [illegible] which [illegible] this

the appeal, the court said (p. 120):

"By the filing [illegible] motion to dismiss
the jurisdiction of the appeal." In dealing [illegible]
appeal, "based upon the orders of the circuit court entered after
[illegible] had been made in the chancellor court to dismiss the
the cause had been docketed in the appellate court for this district,
by order of the circuit court of Cook county, that an appeal from
Trenton, 78 Ill. App. 160, it appears that receivers had been appointed
in the intermediate appeal of Kavanagh, etc. [illegible] v.
[illegible] related by the writ of ne exeat, under the writ order.

fected the appeal in the circuit court.

Our conclusion is that appellant's motion to strike the so-called additional record, filed in this court on January 27, 1932, should be allowed. And it is ordered that the same be stricken.

The main contention of appellant is that the order appealed from (entered November 28, 1931) appointing Mr. Goodspeed as receiver pendente lite, etc., should be reversed, for the reasons in substance that the sworn bill does not contain sufficient allegations of fact, as distinguished from mere conclusions, justifying the order, and, as there are no findings of fact contained in the order nor any certificate of evidence, no necessity for a receiver is disclosed. We agree with the contention. It is in line with numerous decisions of courts of record in this State. (See, Bagdonas v. Liberty Land Co., 309 Ill. 103, 110; Davis v. Blair, 252 Ill. App. 417, 421-2; Strauss v. Georgian Bldg. Corp., 261 id. 284, 288; Frank v. Siegel, 263 id. 316, 323, 325.) Furthermore, the order appealed from is erroneous in that it does not fix any time for the filing of the receiver's bond or of the complainant's bond, - the record not disclosing that such bonds were filed. (Lichtstern v. J. Rosenbaum Grain Co., 176 Ill. App. 250, 256, followed in the unpublished opinions in Blaurock v. Gabel Packing Co., 254 id. 607, and Citizens' Bank v. Blair, 256 id. 605.)

The interlocutory order of November 28, 1931, appointing said receiver, is reversed.

REVERSED.

Kerner and Scanlan, JJ., concur.

treated the appeal in the ultimate court.

Our conclusion is that plaintiff's motion to strike the so-called additional record, filed in this court on January 17, 1933, should be allowed. But it is ordered that the same be stricken from the files. The main contention of appellant is that the order appealed from (entered November 28, 1932) sustaining the demurrer to [illegible] etc., should be reversed, for the reasons in substance that the avers will show not sufficient allegations of fact, as distinguished from mere conclusions, justifying the order, nor that sufficient of evidence, as to qualify for a recovery in plaintiff. We agree with the contention. It is in line with numerous decisions of courts of record in this State. (See, Anderson v. Liberty Land Co., 208 Ill. 148, 154; Beyer v. Platz, 228 Ill. 490, 497; Stevens v. Evanston Side. Comm., 261 id. 184, 204; Young v. Hamel, 262 id. 318, 323, 328.) Furthermore, the order appealed from is fatal in that it does not fix any time for the filing of the respondent's bond or of the complainant's bond, - the record not disclosing such bonds were filed. (Richardson v. J. Pennsylvania Co., 178 Ill. App. 130, 136, followed in the unpublished opinions in Blomquist v. Royal Packing Co., 264 id. 617, and Citizens' Bank v. Platz, 256 id. 608.)

The interlocutory order of November 28, 1932, enjoining said receiver, is reversed.

Reversed.

35281

MARCELLA KOBS,
(complainant),
Appellant,

v.

KRAEMER BUILDING CORPORATION
et al., (defendants),
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 597

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

On February 16, 1931, complainant, Marcella Kobs, holder of two $1000 bonds out of an issue aggregating $1,300,000 secured by a trust deed, filed her bill seeking to remove the Central Trust Company of Illinois as trustee under the trust deed; discovery of the names of other bondholders; appointment of a receiver; foreclosure of the trust deed and an accounting from certain defendants. The defendant, Central Trust Company of Illinois, as trustee, filed its general demurrer, and the defendants Greenebaum Sons Investment Company, Charles A. Pfingsten, Chicago Title & Trust Company, as trustee, and Great American Securities Company, filed their general and special demurrers. All of the demurrers were sustained by the chancellor, and the complainant electing to stand by her bill it was dismissed for want of equity. From this decree complainant appealed and the ruling of the court in sustaining the demurrers is assigned as error.

The allegations of the bill are substantially as follows: Greenebaum Sons Investment Company was an "affiliated" institution of the Greenebaum Sons Bank & Trust Company, a banking institution, which on April 30, 1927, changed its name to Bank of America, and on January 15, 1929, it consolidated with the Central Trust of

266 I.A. 397

Illinois; that on and prior to November 25, 1925, Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company were located in the same building; that all the stock of Greenebaum Sons Investment Company was owned and controlled by Greenebaum Sons Bank & Trust Company; that on and prior to November 25, 1925, Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company "developed a scheme" to sell large construction bond issues by means whereof they were enabled to charge large commissions and other financing expenses and interest at the highest rate, and offer for sale to the general public their so-called "mortgage gold bonds" as safe and sound investments, and in the course of advertising said scheme caused the following advertisement to be printed and circulated among the purchasers of such bonds:

> "GREENEBAUM BONDS - 100% Safe Since 1855 Extreme safety for invested funds has always formed the foundation for Greenebaum First Mortgage Real Estate Bonds. Every precaution necessary to assure complete protection of principal, is covered by the definite Greenebaum system of BANK SAFEGUARDS - Drawn from the wide experience of over 70 years of successful investment activities.
>
> Continual supervision by the OLDEST BANKING HOUSE IN CHICAGO acting as Trustee in every bond issue, comprises added assurance of complete safety. Prompt payment of principal and interest is made certain by monthly deposits in advance, required by the Trustee in every issue.
>
> Through more than two-thirds of a century, every dollar of principal and interest on Greenebaum Bank Safeguarded Bonds has been promptly and fully paid to investors when due.
>
> Invest your funds in Greenebaum Bonds and assure yourself maximum protection, substantial interest return and complete investment satisfaction under any and all conditions.
>
> GREENEBAUM SONS INVESTMENT COMPANY
>
> Founded 1855 Chicago.
>
> Identical with Greenebaum Sons Bank and Trust Company, Oldest Banking House in Chicago, Founded 1855. Combined Resources over $35,000,00."

lished among the participants of such venture:

"QUEEN'S/COM QUEST - 100% Safe since 1850 Extreme
safety for invested funds are simple terms found the
foundation for Queensbury First Mortgage Real
Estate Bonds. First participation necessary to
assure complete protection of principal, is entered
at the earliest Queensbury System of BANK RECOMMENDED -
known from the wide experience of over 20 years of
successful investment activities.

Through more than two-thirds of a century, every
dollar of principal and interest on Queensbury Bank
mortgage bonds has been promptly and fully paid
to investors when due.

Issued in denominations of $ 100, $ 500, $ 1000
and $ 5000 bearing interest at the highest rate,
other financing schemes and interests at the highest rate, and offer
by means adapted only more complex to study large commitments and
Queensbury Home Investment Company and Queensbury Home Bank & Trust
Company "developed a scheme" to sell large construction bond issues
for cash to the general public through so-called "safeguard bond issue"
as safe and sound investments, and in the course of advertising said
scheme caused the following advertisement to be printed and circu-

lated among the participants of such venture:

"QUEEN'S/COM QUEST - 100% Safe since 1850 Extreme
safety for invested funds are simple terms found the
foundation for Queensbury First Mortgage Real
Estate Bonds. First participation necessary to
assure complete protection of principal, is entered
at the earliest Queensbury System of BANK RECOMMENDED -
known from the wide experience of over 20 years of
successful investment activities.

Through more than two-thirds of a century, every
dollar of principal and interest on Queensbury Bank
mortgage bonds has been promptly and fully paid
to investors when due.

Issued in denominations of $ 100, $ 500, $ 1000
and $ 5000 bearing interest at the highest rate,
payable quarterly and semi-annually, as desired.
Investment Company and Queensbury Home Bank & Trust Company are
located in the same building; that all the stock of Queensbury
Home Investment Company was owned and controlled by Queensbury Home
Bank & Trust Company; that on and prior to November 4, 1929,
Queensbury Home Investment Company and Queensbury Home Bank & Trust
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and $ 5000 bearing interest at the highest rate,
payable quarterly and semi-annually, as desired.
Investment Company and Queensbury Home Bank & Trust Company are
located in the same building; that all the stock of Queensbury
Home Investment Company was owned and controlled by Queensbury Home
Bank & Trust Company; that on and prior to November 4, 1929,

That by means of said advertisement complainant was led to believe the ownership of Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company were identical; that the original bond issue, when the building was constructed was $900,000, and that in order to charge large commissions and to avoid the laws of usury they caused a building corporation to be organized to be known as Kraemer Building Corporation to which title was conveyed, and they caused their so-called first mortgage gold bonds to be issued by said corporation in the amount of $1,300,000 payable in various installments, the final maturity being December, 1940, bearing interest at 6½% per annum, payable at the office of Greenebaum Sons Investment Company; that the proceeds of this loan were to be used by them to replace their original bond issue and the balance in payment to themselves of large commissions and usurious interest in a sum unknown to complainant, but that complainant was informed and believed the information to be true, to be approximately $100,000; that the Kraemer Building Corporation executed a deed in trust securing said bond issue to Greenebaum Sons Bank & Trust Company, dated November 20, 1925, conveying certain real estate therein described, which trust deed was duly acknowledged and recorded in the office of Recorder of Deeds of Cook County on November 25, 1925, as Document No. 9107822. Section 13 of Article 1 of the trust deed is as follows:

"That until all the bonds hereby secured, together with interest accrued thereon, and all charges hereunder shall be fully paid and satisfied, said mortgagor will deposit with said Trustee, on or before the first day of each month, beginning with the month of December, 1925, and ending with the month of November, 1940, an amount equivalent to one-sixth (1/6) of the next maturing interest payment upon all bonds then outstanding, and also an amount equivalent to one-twelfth (1/12) of the current year's taxes and assessments upon said premises, estimated upon the basis of the taxes and assessments for the preceding year; and will also deposit with said Trustee, on or before the first day of each month, beginning with the month of December 1st, 1926, and ending with the month of

is as follows:

[illegible] of Article I of the trust deed with the [illegible] of Cook County on December 30, 1920. As described, main first deed was only partially released in October, 1922, and trustee to terminate [illegible] trust. On December 31, 1923, conveying certain real estate therein [illegible] and Trust Company to Terminate [illegible] that the Grand Building Corporation executed a deed in trust believed the information is so true, to be approximately [illegible] improvements as of [illegible] per annum, payable at the office of Grand-Dana Investment Company) that the proceeds of this loan were to be used by them to replace their original bond issue and the balance in payment to shareholders of large commissions and warrious interest in a new business to commence, but that completions was delayed and [illegible] improvements, the final maturity being December, 1940, bearing said corporation in the amount of $3,[illegible],000 payable in various semi-annual first mortgage gold bonds to be issued by caused their re-entire first mortgage gold bonds to be issued by Grand Building Corporation to which title was conveyed, and that they caused a building corporation to be organized to be known as under it obtain large commissions and to avoid the loss of money [illegible] Grand Company note signatures and [illegible] that the original bond issue, when the building was constructed and $[illegible],000, and that in [illegible] the proceeds of bonds sufficient to complete the building and to pay commissions and interest on bonds, and that the original bond issue [illegible] Grand Company note signatures and [illegible] that the original bond issue, when the building was constructed and $[illegible],000, and that in order to obtain large commissions and to avoid the loss of money they caused a building corporation to be organized to be known as Grand Building Corporation to which title was conveyed, and that said corporation in the amount of $3,[illegible],000 payable in various semi-annual first mortgage gold bonds to be issued by them to replace their original bond issue and the balance in payment to shareholders of large commissions and warrious interest in a new business to commence, but that completions was delayed and believed the information is so true, to be approximately $[illegible] that the Grand Building Corporation executed a deed in trust to Terminate [illegible] Trust Company, dated December 31, 1923, conveying certain real estate therein described, main first deed was only partially released in October, 1922, and [illegible] of Article I of the trust deed with the [illegible] of Cook County on December 30, 1920. As

November, 1939, an amount equivalent to one-twelfth (1/12) of the principal of the installment of bonds next maturing."

Section 14 of Article 1 of said trust deed reads as follows:

"For the purpose of better securing the performance of the alleged covenants to make said payments and the performance of all the other covenants and conditions herein contained to be performed by said mortgagor, said mortgagor does hereby transfer, assign and set over to the said party of the second part as Trustee herein, all rents, issues and profits hereafter accrued under any and all leases heretofore or hereafter made of apartments or space in the building now situated upon the premises hereinabove described; provided, however, that until some default will have been made in the due and punctual payment of the interest or principal of any bond hereby secured, or in the due and punctual performance and observance of some other covenant obligatory upon the mortgagor, the mortgagor shall be permitted to collect and receive all such rents, issues and profits arising or accruing at any time under said leases. Upon the happening of any such default, the Trustee shall ipso facto without notice become entitled to collect and receive all such rents, issues and profits and the failure of the Trustee to so collect and receive such rents, issues and profits shall not constitute a waiver of the right of such Trustee to such rents, issues and profits and/or of the right to receive and collect the same."

Section 2 of Article 4 reads as follows:

"The trustee shall not be liable for the exercise of or failure to exercise any discretion or power hereunder, or mistakes or errors, in judgment, or otherwise in connection with this trust, except for its own willful misconduct or gross negligence."

It appears that each of the bonds secured by the trust deed contains the following: "The payment hereof, * * * is secured by deed of trust of even date herewith, conveying in fee to Greenebaum Sons Bank & Trust Company, as trustee, * * * and a full description of which deed of trust and the terms and conditions under which the bond is issued, secured and held, reference is made to said deed of trust."

The bill further alleged that about the time when "they" floated the first mortgage gold bonds to replace the former bond issue of $900,000 "they" also floated a junior bond issue in the amount of $340,000 secured by a trust deed to M. Ernest Greenebaum, Jr., which trust deed was dated November 21, 1925, recorded November 25, 1925; that the foregoing first mortgage gold bonds were sold to

complainant and to the general public upon the representations that the investments were safe and sound and that the interest and principal would be promptly paid, and relying on these representations, and believing them to be true, complainant purchased bonds numbers 742 and 2576 of which she is now the legal holder and owner, and the other bonds were sold to numerous owners who are unknown to the complainant, the names of whom are in possession of Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company; that while it was represented to complainant, as well as to other bond purchasers, that the placing of the real estate with the Greenebaum Sons Bank & Trust Company in trust as security was for the purpose of protecting them, the real object of Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company was to safeguard their own interest and to the detriment of the bondholders, and for such purpose they caused to be inserted in the trust deed, Section 1 of Article 3, which reads as follows:

"It is hereby declared and agreed as a condition upon which each legal holder or holders of all or any of said bonds receives and holds the same, that no holder or holders of any of said bonds or coupons shall have the right to institute any proceeding in law or in equity, of whatever character or kind, for the foreclosure of this deed of trust or for the execution of the trust herein provided, or for the appointment of a Receiver, or for any other remedy under this instrument, or for enforcing the lien hereby created, without having first made application to the Trustee, as hereinbefore provided, and until sixty (60) days after the giving of notice in writing to the Trustee, and the failure of the Trustee to institute proceedings for the foreclosure of this deed of trust, or for the execution of the trusts hereunder, or for the appointment of a Receiver, or for any other remedy under this deed of trust or for enforcing the lien hereby created, as the case may be. All rights of action under this deed of trust or under any bonds or coupons secured thereby, may be enforced by the Trustee in its discretion without the possession of any of the bonds or coupons or the production thereof on any trial or proceedings hereunder."

And also a provision in Section 1, Article 2, that the trustee could not be compelled to commence foreclosure unless request be made by owners of at least two per cent of the total bond issue; that by

means of the foregoing provisions, and other provisions contained in said trust deed, "they" placed themselves in control of the real estate so that "they" might prevent action on the part of the bondholders either at law or in equity; that "they" are in sole possession of the names and addresses of each of the bondholders and that their names and addresses are kept secret and no individual bondholder is in a position to obtain the aid and assistance of any other bondholder for the purpose of acquiring the two per cent in order to compel the trustee to act; that it is unjust and inequitable to enforce these provisions which enable Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company to take charge of bond owners by the provisions which were inserted therein for their own benefit and without actual knowledge of the bond owners who were never told or made acquainted with such conditions and provisions, and that such provisions were unreasonable and against public policy and law and ought to be declared null and void and of no force and effect; that for the purpose of preventing the legal holders and owners of the bonds to take action without the consent of Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company "they" inserted in the trust deed Section 1 in Article 3 providing that the exclusive right of action be in the trustee and calling for a sixty day notice to the trustee; that default was made by the mortgagor in the payment of bonds numbers 119 to 138 for $1000 each, maturing December 1, 1930, aggregating $29,500 and in the payment of semi-annual interest which matured on said date, aggregating $42,500 of which default the Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company had due notice; that no steps were taken by the trustee to protect the bondholders to institute foreclosure proceedings or other proceedings to collect and preserve the income of the property for the use and benefit of the bondholders, but instead the trustee

permitted the Greenebaum Sons Investment Company to "develop a scheme" to acquire the premises and the interest of the bond owners, as it will more fully appear hereafter, and permitted the Greenebaum Sons Investment Company to collect the entire income from the property, and to convert and appropriate it to its own use and the irreparable loss of the bondholders; that Kraemer Building Corporation was insolvent and had transferred the title and ceased to do its corporate business, all to the detriment of the complainant and of all other bond owners.

It further alleged that M. Ernest Greenebaum, Jr., the trustee under the junior mortgage aggregating $340,000, who was an officer and stockholder in Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company subsequent to the placing of the first mortgage gold bonds and the junior mortgage bonds, had caused foreclosure proceedings to be instituted on the junior mortgage which was then owned either by Greenebaum Sons Investment Company or Greenebaum Sons Bank & Trust Company, by means of which foreclosure it acquired title to the premises in the name of Charles A. Pfingsten, who was then in their employ, and in order to conceal that they were the owners of the real estate, they caused Charles A. Pfingsten to convey the title to Chicago Title & Trust Company by deed in trust filed January 15, 1930, and by means of such foreclosure and control of the property, as aforesaid, they received $60,021.82 being all the income from the premises; that said Greenebaum Sons Investment Company, through its employee, Charles A. Pfingsten, is now collecting the income from the property, appropriating it to its own use and is refusing to apply any part thereof to the payment of principal or interest on the first mortgage bonds; that after first acquiring the money of the bondholders from the sale of the first mortgage bonds, and thereafter acquiring the title and permitting

Investment

the corporation to default in the payment of principal and interest and receiving the income to their own use and benefit, the Greenebaum Sons Investment Company, its bank or trustee, have devised a "scheme" to also acquire for themselves the so-called gold bonds of the complainant as well as all other bondholders at less than their par value and to invest themselves with the ownership and control of said premises without paying the bond owners the amount due them, or without accounting to them for the proceeds of the sales of said bonds and toward such end and purpose "they" formed a so-called "committee" for the protection of the bondholders and on August 19, 1930, "they" caused a communication to be addressed to all of the bond owners; that while the bond owners were led to believe that this committee was organized by the bond owners and for their protection, in truth and in fact none of the bondholders was consulted with reference to the organization of this committee, and had no voice in its selection and no bond owners ever requested the committee to act, but it was organized by the Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company for the purpose of acquiring the bonds in their own possession, and to thereafter control the entire situation; that "they" at no time informed any of the bondholders that the property securing the bond issue was in truth and in fact owned by them; that the committee for the alleged protection of the bond owners was actually organized for their own protection, and that the bond owners were requested to deposit their bonds with the committee so organized by them, by the terms of which that committee would be authorized to do or cause to be done whatever the committee in its sole discretion might deem expedient; that no provision, however, was made for the payment to said committee of any of the funds collected from the premises by Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company toward the principal or

interest of said bonds; that while the committee has the bonds in its control, it is considered to be the sole owner of the bonds, and the bond owner can take no further steps with reference to the enforcement of said bonds to protect his rights or interests therein, and by means of the foregoing it is the plan of the Greenebaum Sons Investment Company and trustee to prevent action on the part of the bond owners so that they would be permitted to receive the income of the property and to use it for their own benefit and the detriment of the first mortgage bond owners.

It further alleged that no steps were taken by Greenebaum Sons Investment Company, Greenebaum Sons Bank & Trust Company, Central Trust Company of Illinois, as trustee, and the committee to protect and safeguard the interests of the bond owners; that each bond contains the following provision: "The prompt payment of the within bond and the interest thereon, when due, * * * has been guaranteed by Otto C. Kraemer by an agreement of guaranty bearing even date with the within bond duly executed by him and deposited with Greenebaum Sons Investment Company, for the benefit of the holder of the bond" and with knowledge of the terms of said agreement, and while they knew of the default, they took no steps to either foreclose the bond issue or appoint a receiver to collect the income of the premises or to sue the guarantor, but instead permitted Greenebaum Sons Investment Company to collect the income from the premises for its own use and benefit as the real owners of the property and that neither the committee nor trustee are acting in their capacity as representatives of the holders of the bonds, but interested in their own welfare and protection at the expense of the bondholders and to their detriment and injury; that by reason of the fact that the trustee was and is affiliated with Greenebaum Sons Investment Company and permitted it and its committee to prejudice the interests of the

bond owners, and by reason of the fact that "some" of the officers of Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company and the fact that the trustee has permitted the collection of the income from the property without safeguarding and protecting the bond owners, the trustee was therefore disqualified to act, and is no longer a proper party to act as trustee and should therefore be removed as such and a new trustee be either elected or appointed by the court who would protect the rights of the bond owners.

It further alleged that although the trust deed requires for the purpose of compelling the trustee to act that two per cent of the bond owners join such request, yet such compliance is impossible, for the reason that the names and addresses of the owners of the bonds are solely in the possession of Greenebaum Sons Investment Company, which refuses to disclose them, so that neither complainant nor any other bondholder is in position to communicate with each other for the purpose of compelling action, and complainant alleges that there are more than two per cent that would like to join in a demand for the removal of the trustee now acting and for a new trustee to be appointed, but by reason of the lack of communication between them it is impossible for them at the present time to join together, and that this bill is therefore filed for the benefit and advantage of all bond owners desiring to join; that by reason of the foregoing facts a demand upon the trustee to foreclose said trust deed and compel a just and true accounting of the application of the income by Greenebaum Sons Investment Company, Greenebaum Sons Bank & Trust Company and their agents, and to take necessary steps to conserve the premises for the benefit of the bond owners would be of no avail as the trustee is working in collusion with Greenebaum Sons Investment Company and its committee.

Complainant charges that the insertion in the trust deed of Section 1, Article 2, under which the trustee could not be compelled to commence foreclosure proceedings unless request be made by owners of at least two per cent of the total bond issue was against public policy and law. Such is not the law. In Seibert v. Minneapolis & St. L. Ry. Co., 55 N. W. 1134, 1136, it was said:

"We are unable to see why the bondholders, subject to reasonable limitations, may not be bound by stipulations in the mortgage of this character, waiving a default, and providing, subject to the conditions named, for the foreclosure by the trustee exclusively. * * * 'They are agreements which the bondholders are at liberty to make, and there is nothing illegal or contrary to public policy in them.' It is not the intention or effect of such conditions or stipulations to divest the bondholders of their right to judicial remedies, or to oust the courts of their jurisdiction; it is merely the imposition of certain conditions upon themselves in respect to the exercise of that right."

In Chicago and Vincennes R. R. Co. v. Fosdick, 106 U. S. 44, 77, it was said: "It is an agreement which the parties were at liberty to make. There is nothing in it illegal or contrary to public policy."

In Pearlman & Co. v. Lincoln-Belmont Bldg. Corp., 251 Ill. App. 135, 137, certiorari denied by the Supreme Court, it was said: "As a general proposition the owner of a bond secured by a mortgage or trust deed has a right to institute foreclosure proceedings where there is a default in payment, but it is obvious that this right may be restricted or limited by agreement between the bondholders and that this limitation may be expressed in the trust deed or mortgage." See also Belleville Savings Bank v. Mercantile Trust Co., 194 Ill. App. 175; Romberg v. Int. Ind. Tel. & Teleg. Co., 200 Ill. App. 509. But it is contended the bill also charges a fraudulent scheme between the Greenebaum Sons Investment Company and the Greenebaum Sons Bank & Trust Company in placing the bond issue in an excessive amount; that the placing of the real estate in trust with Greenebaum Sons Bank & Trust Company and the insertion in the trust deed of Section 1,

Article 2, and Section 1, Article 3, was to safeguard the interests of the Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company and to the detriment of the bondholders; that the trustee failed to require the monthly payments provided by the trust deed and was thereby negligent; that the trustee permitted the Greenebaum Sons Investment Company to collect the income after default in payment of the principal on the first mortgage and to apply it to the payment of the junior mortgage owned by the Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company and to divert to their own use $60,021.82; that the Greenebaum Sons Investment Company secretly owned the title and concealed the information from the bondholders; that they formed a bond owners' committee to defeat the interests of the bondholders and to acquire the bonds at less than their actual value; that they refused to reveal the names of the bond owners in order that the required two per cent could not make a proper demand on the trustee to act; that it was impossible to comply with the provisions of the trust deed to make a demand by the required two per cent because it was prevented by them; that because of the "affiliations" of the trustee, the Greenebaum Sons Bank & Trust Company and the Greenebaum Sons Investment Company and their collusion, a demand would be of no avail, and with these charges in the bill it was error to sustain the demurrers.

The effect of a demurrer in equity is to admit the truth of all the facts properly pleaded, as distinguished from conclusions, but it does not admit inferences of law drawn from those facts, and every allegation is to be taken most strongly against the pleader. The charges that all the stock of the Greenebaum Sons Investment Company was owned and controlled by the Greenebaum Sons Bank & Trust Company and that Greenebaum Sons Investment Company and Greenebaum

Sons Bank & Trust Company developed a scheme to sell large construction bond issues and that they formed a bond owners' committee to defeat the interests of the bond owners and acquire bonds at less than their actual value, and that because of the affiliations of the trustee, the Greenebaum Sons Investment Company and Greenebaum Sons Bank & Trust Company and their collusion, a demand would be of no avail, were not admitted by the demurrer, for they were only the pleader's conclusions, and it is not sufficient to allege fraud generally. No sufficient facts were stated or appeared from the bill. Nor can it be said that because the trust deed had inserted therein Section 1, Article 2, and Section 1, Article 3, which are normal and customary clauses found in trust deeds and regarding which bondholders are at liberty to contract, that the same were so inserted to the detriment of the bondholders and were fraudulent as fraud is not deducible from facts and circumstances plainly consistent with honest intention. Furthermore, the bill is defective in many other respects. It contains immaterial allegations, does not allege any facts showing any conflict of interest between the trustee and the bondholders or identity of interest between the trustee and the Greenebaum Sons Investment Company.

As grounds for the removal of the trustee it is alleged that it permitted Greenebaum Sons Investment Company to collect the income from the real estate and failed to require the monthly payments provided by the trust deed to be made to it. All that a court requires from a trustee are common skill, common prudence and common caution and the honest exercise of a discretionary power in the absence of supine negligence or wilful default. (Suffolk Y. Leiter, 261 Ill. App. 82, 108.) The trust deed provides (Article 4, Section 2) that:

"The trustee shall not be liable for the exercise of

or failure to exercise any discretion or power hereunder, or mistakes or errors, in judgment, or otherwise in connection with this trust, except for its own wilful misconduct or gross negligence."

The bondholders were entitled to receive the principal and interest on their bonds when due. It appears from the bill that no default occurred in the payment of either until December 1, 1930. The first time the trustee could have taken any action was thirty days after default and then not for foreclosure of principal unless the holders of two per cent of the bonds so elected. Under this state of the record it cannot be said that the bill alleged such facts as would warrant the removal of the trustee.

It is also contended by the complainant that the court erred in denying the motion to consolidate her bill with the foreclosure suit instituted by the Central Trust Company of Illinois. It appears that after the complainant had filed her bill and before any hearing was had on the demurrers filed in the instant case, the Central Trust Company of Illinois as trustee, on March 5, 1931, filed its bill to foreclose the trust deed; thereafter on March 17, 1931, complainant filed her petition praying that that proceeding might be consolidated with the instant case. Her motion was denied, and she now assigns this as error. The question whether causes involving the same question shall be consolidated in the trial court is one resting largely in the sound discretion of that court (Irmegar v. County of Tazewell, 264 Ill. 172), and unless that discretion has been greatly abused, we will not interfere. (Miles v. Danforth, 37 Ill. 157, 162.)

The bill of complaint failing to show on its face that complainant was entitled to the relief sought, the chancellor properly sustained the demurrers. Decree affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

[illegible] of Calibre to exercise any discretion or power incumbent, or [illegible] statutes or orders, in judgment, or otherwise in connection with [illegible] trust, except for its own wilful misconduct or gross negligence."

The indentures were entitled to receive the principal and interest on their bonds when due. It appears from the bill that no default occurred in the payment of either April 1, 1930. The first time the trustee could have taken any action was shortly after default and then for foreclosure of priority notes, the holders of two per cent of the bonds to elected. Under this whole of the record it cannot be said that the bill alleges such facts as would warrant the removal of the trustee.

It is also warranted by the supplement that the court acted in duly in the matter to consolidate the bill with the foreclosure suit instituted by the General Trust Company of Illinois. It appears that after the complainant had filed her bill and before any hearing was had on the receivers filed in the instant case, the Central Trust Company of Illinois on March 3, 1931, filed its bill to foreclose the first deeds. Thereafter on March 17, 1931, complainant filed her petition praying that that proceeding might be consolidated with the instant case. Her motion was denied, and she now assigns this as error. The question whether separate suits involving the same question should be consolidated in the trial court is one resting largely in the sound discretion of that court (Lyster v. County of Tazewell, 148 Ill. 178), and unless that discretion has been plainly abused, we will not interfere. (Spitz v. Goldrath, 87 Ill. 187, 189.)

The bill of complaint failing to show on its face that complainant was entitled to the relief sought, the demurrer properly sustained the demurrer. Decree affirmed.

Affirmed.

Wright, J., and Dunham, J., concur.

35465

DELIA McCAULEY,
(plaintiff),
Appellant,

v.

MILTON E. HELIN and
CHARLES J. AGNEW,
(defendants),
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

266 I.A. 597

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Milton E. Helin and Charles J. Agnew for personal injuries received as a result of a collision between the automobile in which she was a passenger, owned by Charles J. Agnew and driven by his chauffeur, and the automobile of Milton E. Helin. At the close of plaintiff's case the court directed the jury to find the defendant Charles J. Agnew not guilty, and at the close of the trial the jury returned a verdict finding the defendant Milton E. Helin not guilty, upon which finding judgment was entered. To reverse this judgment plaintiff appealed.

The plaintiff's amended declaration consists of eight counts. The first alleged in substance that the defendant Helin at the time of the accident was driving an automobile north on Clark street in Chicago; that the defendant Agnew, by his servant and agent, was driving an automobile east on Oak street; that plaintiff was riding as a guest in Agnew's automobile; that Helin and the defendant Agnew, by his servant, so negligently operated their respective automobiles that said automobiles collided, and as a result thereof plaintiff was injured, etc. The second, third, fourth, sixth, seventh and eighth counts charge various specific acts of negligence on the part of the defendants. The fifth count

266 I.A. 397

charged that Agnew, through his agent or servant, so wilfully and wantonly propelled and operated said automobile as to exhibit an entire absence of care for the safety and lives of others, and the defendant Helin so wilfully and wantonly propelled and operated said automobile as to exhibit an entire absence of care for the safety and lives of others, and in consequence thereof, the said automobiles collided with great force and violence, etc. Each count alleged that the plaintiff was at all times in the exercise of ordinary care for her own safety. The defendants each filed a plea of general issue, and the defendant Agnew also filed a special plea denying operation and control of the automobile alleged to have been driven by him, through his servant.

The undisputed evidence discloses that March 25, 1929, between the hours of three and four o'clock in the afternoon, the plaintiff, as an invited guest, was riding east on Oak street, a closely built up portion of Chicago, in a Lincoln automobile owned by Agnew and driven by his chauffeur, and Helin was driving his Buick automobile north on Clark street. The two automobiles proceeded into the intersection and Helin's automobile struck the side of Agnew's automobile, and as a result of the collision the plaintiff was injured.

It further appeared that plaintiff had known Mrs. Agnew, wife of the defendant Agnew, for a long time; that pursuant to an appointment Agnew's chauffeur came to her home with Mrs. Agnew and they were driven to the office of the United Charities. Plaintiff then testified that as they approached Clark street at a speed of twenty-five miles an hour she noticed Helin's automobile moving north on Clark street at about thirty-five miles an hour, but she did not say anything to the chauffeur or to Mrs. Agnew notwithstanding she noticed something to cause her to be fearful, because

operated that Chase, through his agent or servant, so utilized and
maintain boobyflag and otherwise omit automobile as to exhibit an
entire absence of care for the safety and lives of others, and the
defendant fails to utilize and constantly modify and operating
duly automobile as to exhibit an entire absence of care for the
safety and lives of others, and in consequence thereof, the said
automobile collided with said fence and residence, etc. Upon
count alleged that the plaintiff was at all times in the exercise
of ordinary care for her own safety. The defendant each filed
a plea of general issue, and the defendant Jones also filed a special
plea setting forth the defendant Jones was driving the said
automobile with the consent of the plaintiff and that he was
driving at the time complained of.

The undisputed evidence discloses that March 28, 1928,
between the hours of three and four o'clock in the afternoon, the
plaintiff, an invited guest, was riding west on Oak Street, a
dirt road in Jackson County, in a Chevrolet automobile owned
by Chase and driven by his chauffeur, and this was driving his
Buick automobile north on Clark street. The two automobiles pro-
ceeded into the intersection and Allin's automobile struck the side
of Chase's automobile, and as a result of the collision the plaintiff
was injured.

It further appeared that plaintiff had known Mrs. Chase,
prior to the time of the accident, for a long time; that at one
time she had driven to the office of the United Dentists. Plaintiff
subsequent thereto's chauffeur was to her home with Mrs. Chase and
then testified that he took photographs of a piece of
automobile-like wire on the ground near the scene of the accident,
but did not say anything to the chauffeur or to Mrs. Chase concern-
ing the matter; nor did the defendant Jones say it was a 'dentist'
work on Clark street at about thirty-five miles an hour, but she
did not only anything to the chauffeur or to Mrs. Chase concern-
ing the matter; nor did the defendant Jones say it was a 'dentist'

"there wasn't any time for me to say anything."

It was stipulated that Agnew's said chauffeur was hired by Agnew to drive this particular automobile either for him or for Mrs. Agnew's business or pleasure and was told to take orders from and drive Mrs. Agnew whenever and wherever she wanted to go.

It is now well settled that the liability of the owner of an automobile for damages through its negligent operation by another, depends upon the principle of agency. To enable the injured person to recover from its owner damages caused by the negligent operation of an automobile, the plaintiff must prove that the operation was by the owner, or by his servant in the owner's business and by the owner's authority, and if so proved, the negligence of the servant may be imputed to the master and he may be held liable for resulting damages. (Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387; White v. Seitz, 342 id. 266; Andersen v. Byrnes, 344 id. 240.) The test to determine whether the master is liable to a stranger is to inquire whether the servant was doing what he was employed to do at the time he caused the injury. If he was, the master is liable. (Meyer v. Industrial Commission, 347 Ill. 172; Danforth v. Fisher, 75 N. H. 111.) The rule which should be applied upon a motion to direct a verdict is well settled in this State. If there is in the record any evidence from which the jury could find, without acting unreasonably in the eye of the law, that all the material averments of the declaration have been proved, a verdict should not be directed. (Libby, McNeill & Libby v. Cook, 222 Ill. 206; Devine v. Delano, 272 id. 166; Wilcox v. International Harvester Co., 278 id. 465; Vail v. Graham, 259 Ill. App. 172, and cases cited.) All that the evidence tends to prove and all just inferences to be drawn from it in plaintiff's favor must be conceded to her. (Malloy v. Chicago Rapid Transit Co., 335 Ill. 164.)

'there wasn't any item for me to do anything."

It was stipulated that Capps's only connection was based
by Agnew to drive this particular automobile after his car
was. Capps's business or pleasure and not help to take duties from
and drive his. Agnew abandoned and Agreement was vested to Go.

It is now well settled that the liability of the owner
of an automobile for damages through its negligent operation by
another, depends upon the principle of agency. To render the injured
person to recover from the owner damages caused by the negligent
operation of an automobile, the plaintiff must prove that the operation
was by the owner, or by one servant in the owner's business and by
the owner's authority, and if so proved, the negligence of the ser-
vant may be imputed to the master and he may be held liable for
resulting damages. (Nelson v. Union Storage Transfer Co., 241 111.
324; Ihle v. Reid, 241 Id. 466; Hepburn v. Spiro, 241 Id. 280.)
The test to determine whether the master is liable in a situation
is the injuries whether the servant was doing what he was employed to do
at the time he caused the injury. If he was, the master is liable.
(Meyer v. Industrial Commission, 247 111. 1912; Schultz v. Pfaltz,
72 N. E. 111.) The rule which should be applied upon a motion to
direct a verdict is well restated in this there. A there is no
record any evidence from which the jury could find, although nothing
necessarily in the eye of the law, that all the material
of the declaration have been proved, a verdict should not be directed.
(Libby, McNeill & Libby v. Cook, 205 111. 606; Perkins v. Watson,
218 Id. 146; Wilson v. International Harvester Co., 218 Id. 438;
Tait v. Crumbo, 220 111. 434, 436. 172, and cases cited.) 'If that the
evidence tends to prove any fact indispensable to be given from it
in plaintiff's favor must be regarded to her. (Bailey v. Chicago
Rapid Transit Co., 228 111. 146.]

In view of the above mentioned stipulation, the evidence and the law as stated, we think the facts were sufficient to permit the case to go to the jury on the question as to whether the chauffeur was the agent of Agnew in driving his automobile.

It is, however, contended by Agnew that even assuming that he had exclusive control of the chauffeur the court did not err in directing the verdict because there was no evidence showing he was guilty of wilful and wanton misconduct. It appears from the evidence that the chauffeur was driving at the time at the rate of twenty-fives miles an hour in a closely built up portion of Chicago. Under such circumstances we are of the opinion that question was one for the jury to determine, and that the court erred in directing a verdict in Agnew's favor.

Plaintiff also contends that the court erred in giving instruction No. 1 offered by the defendant Helin. It will not be necessary to pass upon that instruction nor to express an opinion as to whether any liability exists as against the defendant Helin. The judgment in favor of Milton E. Helin and Charles J. Agnew and against the plaintiff is a joint one. A judgment at law is a unit and if it is erroneous as to one defendant it must be reversed as to all defendants. (Harp v. Lee, 71 Ill. 193, 197; Singer v. Cross, 257 Ill. App. 41, 44; Livak v. Chicago & Erie R. R. Co., 299 Ill. 218.)

The judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

35510

WILLIMINA McCLEOD HOGG,
(plaintiff),
Appellee,

v.

DR. CLINTON D. COLLINS,
(defendant),
Appellant.

217

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

266 I.A. 598

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment on the verdict of a jury against the defendant for $1000. The suit was instituted to recover damages claimed on account of defendant's alleged negligence or unskillfulness in the administering of certain X-ray treatments. To reverse this judgment defendant appealed.

The plaintiff's declaration consists of six counts. Each alleges in substance that during the month of April, 1929, defendant was exercising the profession of physician and surgeon, and that plaintiff employed him to treat her; that defendant unskillfully and negligently conducted himself in that behalf and through his want of skill and care her sickness became greatly increased and aggravated and her right limb was severely burned, etc. The second count alleges that she employed defendant to attend and treat her for the cure of a certain blemish; that defendant was possessed of a certain mechanical apparatus known as an X-ray machine, which he used in his treatment of plaintiff's disorder and which he applied to and upon her right limb, carelessly, negligently and unskillfully, and as a direct result her limb was severely burned and it became and was necessary for her to undergo two serious operations on her right limb, etc. The third count

26510

WILHELMINA [illegible],
(Plaintiff),
Appellee,

v.

DR. [illegible],
(Defendant),
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

266 I.A. 598

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment on the verdict of a jury against the defendant for $1500. The suit was instituted to recover damages claimed on account of defendant's alleged negligence or unskillfulness in the administering of certain X-ray treatments. To reverse this judgment defendant appealed.

The plaintiff's declaration consists of six counts. Each alleges in substance that during the month of April, 1929, defendant was exercising the profession of physician and surgeon, and that plaintiff employed him to treat her; that defendant unskillfully and negligently conducted himself in that behalf and through his want of skill and care her sickness became greatly increased and aggravated and her right limb was severely burned, etc. The second count alleges that she employed defendant to attend and treat her for the cure of a certain disease; that defendant was possessed of a certain mechanical apparatus known as an X-ray machine, which he used in his treatment of plaintiff's disorder and which he applied to and upon her right limb, carelessly, negligently and unskillfully, and as a direct result her limb was severely burned and it became and was necessary for her to undergo two serious operations on her right limb, etc. The third count

alleges that defendant negligently failed to use and employ sufficient and proper filtering media and as a result her right limb became severely burned. The fourth count alleges that in and about the application of the X-ray treatment, defendant carelessly applied said electrical rays too frequently, and as a result her right limb became severely burned, etc. The fifth count alleges that defendant applied the X-ray treatment without first ascertaining the affect of the application, etc. The sixth count alleges that in the use of said electrical machine, defendant acted carelessly and as a result her right limb was severely burned, etc. Each count alleged that plaintiff was at all times in the exercise of ordinary care for her own safety, and that she was compelled to and did expend $1000 for medical, surgical, hospital and nursing, etc. The defendant filed a plea of general issue.

There is virtually no dispute as to the material facts. Defendant is a physician and since 1890 has continuously practiced his profession in Chicago, twenty-five years of which have been devoted to X-ray dermatology. During the month of April, 1929, plaintiff was suffering from what she described as a redness of her ankles, for which on April 29 she consulted defendant. He examined her and found varicose and red dilated veins around the ankles and advised injections and X-ray treatments. On her second visit to his office, she was prepared for an X-ray treatment, defendant using a Victor Universal X-ray machine. The treatment consisted of adjusting a large globe around the lower part of her limbs, first one and then the other. Following this treatment she was told to return in a couple of days. On her third visit both of her limbs were injected identically alike, the injection consisting of a small amount of quinine, given to retract the veins, which is the usual treatment for such ailments, and an X-ray treatment administered.

alleges that saleswoman negligently failed to use and employ sufficient and proper filtering media and as a result her right lung became severely burned. The fourth count alleges that in exposing the plaintiff to the X-ray treatment, defendants negligently applied said electrical rays too frequently, and as a result her right lung became severely burned, etc. The fifth count alleges that defendants applied the X-ray treatments without first ascertaining the effect of the application, etc. The sixth count alleges that in the use of said electrical machine, defendants acted carelessly and as a result her right lung was severely burned, etc. Each count alleged that plaintiff was at all times in the exercise of ordinary care for her own safety, and that she was compelled to and did expend $1500 for medical, surgical, hospital and nursing, etc. The defendants filed a plea of general issue.

There is virtually no dispute as to the material facts. Defendant is a physician and since 1890 has continuously practiced his profession in Chicago, twenty-five years of which have been devoted to X-ray dermatology. During the month of April, 1920, plaintiff was suffering from what she described as a redness of her ankles, for which on April 29 she consulted defendant. He examined her and found various red and dilated veins around the ankles and advised injections and X-ray treatments. On her second visit to his office, she was prepared for an X-ray treatment, defendant using a Victor Universal X-ray machine. The treatment consisted of adjusting a large globe around the lower part of her limbs, first one and then the other. Following this treatment she was told to return in a couple of days. On her third visit both of her limbs were injected identically alike, the injection consisting of a small amount of quinine, given to contract the veins, which is the usual treatment for such ailments, and an X-ray treatment administered.

Upon arriving at her home she noticed a soreness and swelling. On her fourth or fifth visit she noticed a little redness on her right limb, about seven inches above the ankle. On her seventh visit defendant opened up this sore spot from which black blood oozed. He carefully cleaned, dressed it and placed a paste over the sore. On her eighth visit she noticed her limb getting worse and the swelling seemed to be spreading. On her twelfth visit she was told by the defendant that he was sending her to Dr. A. G. Zimmerman, one of the finest surgeons in Chicago. The following day she saw Dr. Zimmerman, who examined her and found an abscess on her right limb between the foot and the knee and advised that she enter a hospital, which she did. Twenty-four hours after she entered the hospital Dr. Zimmerman opened the abscess and found an accumulation of pus and decayed material.

Plaintiff testified that on her eighth visit one Margaret Jones, a nurse, in the presence of defendant, told her that she (plaintiff) had been burned, and that on the tenth visit the defendant told her "I am sorry I burned you." However, the nurse and the defendant both denied making such statements.

Dr. Fred F. Schwartz, an expert, testified on behalf of the plaintiff, that in his opinion the correct use of the X-ray will not result in a burn and that X-ray treatments are not the usual, customary and proper treatment for the removal of varicose veins; that a filter should be used and that it was not the usual and proper practice to use the X-ray when a drug had been used previous to the application of the X-ray.

On behalf of the defendant Doctors A. G. Zimmerman, Paul McDaniel and Julius Gurvey, the nurse, Margaret Jones, and defendant testified that they either treated or assisted in the treatment of plaintiff and had an opportunity to see and observe

Upon arriving at her home she noticed a redness and swelling. On her fourth or fifth visit she noticed a little redness on her right limb, about seven inches above the ankle. On her seventh visit defendant opened up this sore spot from which black blood oozed. He carefully cleansed, dressed it and placed a paste over the sore. On her eighth visit she noticed her limb getting worse and the swelling seemed to be spreading. On her twelfth visit she was told by the defendant that he was sending her to Dr. [illegible] Liebermann, one of the finest surgeons in Chicago. The following day she saw Dr. Liebermann, who examined her and found an abscess on her right limb between the foot and the knee and advised that she enter a hospital, which she did. Twenty-four hours after she entered the hospital Dr. Liebermann opened the abscess and found an accumulation of pus and [illegible] material.

Plaintiff testified that on her eighth visit one Margaret Jones, a nurse, in the presence of defendant, told her that she (plaintiff) had been burned, and that on the tenth visit the defendant told her "I am sorry I burned you." However, the nurse and the defendant both denied making such statements.

Dr. Fred J. Robertson, an expert, testified on behalf of the plaintiff, that in his opinion the correct use of the X-ray will not result in a burn and that X-ray treatments are not the usual, customary and proper treatment for the removal of varicose veins; that a filter should be used and that it was not the usual and proper practice to use the X-ray when a drug has been used previous to the application of the X-ray.

On behalf of the defendant [illegible], [illegible] Liebermann, Paul [illegible] and Julius [illegible], the nurse, Margaret Jones, and defendant testified that they either treated or assisted in the treatment of plaintiff and had an opportunity to see her [illegible]

her condition and each of them testified she did not have an X-ray burn.

No physician or expert witness testified the plaintiff had an X-ray burn. Her claim that she was burned rests solely upon her own testimony that the nurse and defendant had admitted that she had been burned.

Defendant contends that the verdict and judgment are against the manifest weight of the evidence. We think there is merit in this contention. In order to recover it was necessary for the plaintiff to prove by a preponderance of the evidence that she was burned through the negligence of the defendant. The question as to whether the plaintiff was burned depends wholly upon her testimony that the nurse and defendant had admitted that she had been burned. She offered no affirmative proof that she was in fact burned. Before a plaintiff can recover in a malpractice case, it must be shown by affirmative evidence, first, that defendant was unskillful and negligent, second, that his want of skill and care caused the injury to the plaintiff. (Ewing v. Goode, 78 Fed. 442; Moline v. Christie, 180 Ill. App. 554; Wallace v. Yudelson, 244 Ill. App. 320.) The testimony of Doctors Zimmerman, McDaniel and Gurvey, that plaintiff was not burned, was not contradicted. A verdict rendered in the face of this testimony can rest only upon the assumption of superior knowledge by the jury. It was the duty of the jury to render a verdict upon the evidence, and that it did not do.

The judgment is reversed for the reasons pointed out and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

35570

CENTRAL TRUST COMPANY OF ILLINOIS,
Complainant-Appellee,

vs.

KRAEMER BUILDING CORPORATION et al.,
Defendants.

On Appeal of MARCELLA KOBS,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

266 I.A. 598

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

On March 5, 1931, the Central Trust Company of Illinois as trustee, filed its bill to foreclose a trust deed securing a bond issue in the sum of $1,300,000. The appellant, Marcella Kobs, was not a party to the bill. On July 20, 1931, she moved the court for leave to file instanter her petition in which she alleged that on February 16, 1931, she filed her bill in the Superior court of Cook county in case No. 531880, praying for, among other things, a decree of foreclosure of the trust deed made by Kraemer Building Corporation on November 20, 1925, and involved in the instant case, to which demurrers were filed and sustained and her bill dismissed for want of equity; that she prayed an appeal to the Appellate court of Illinois for the First District and that said appeal is pending and undetermined; and prayed the court to stay further proceedings in the instant case. The chancellor denied her motion and refused to stay the proceedings and this appeal followed.

This appeal is simply from an order of the chancellor refusing to stay the proceedings. This was not a final decree. The right of appeal is created by statute, and in the absence of statutory authority therefor an interlocutory order entered in the progress of a cause is not appealable and may be reviewed only upon an appeal from the final order, judgment or decree. An order, judgment or decree is final only when it terminates the litigation between the

35570

CENTRAL TRUST COMPANY OF ILLINOIS,
Complainant-Appellee,

vs.

KRAEMER BUILDING CORPORATION et al.,
Defendants.

On Appeal of MAGNOLIA HOBBS,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

265 I.A. 598

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

On March 5, 1931, the Central Trust Company of Illinois as trustee, filed its bill to foreclose a trust deed securing a bond issue in the sum of $1,350,000. The appellant, Magnolia Hobbs, was not a party to the bill. On July 21, 1931, she moved the court for leave to file instanter her petition in which she alleged that on February 16, 1931, she filed her bill in the superior court of Cook county in case No. 521281, praying for, among other things, a decree of foreclosure of the trust deed made by Kraemer Building Corporation on November 2, 1925, and involved in the instant case, to which demurrers were filed and sustained and her bill dismissed for want of equity; that she prayed an appeal to the Appellate court of Illinois for the First District and that said appeal is pending and undetermined; and prayed the court to stay further proceedings in the instant case. The chancellor denied her motion and refused to stay the proceedings and this appeal followed.

This appeal is simply from an order of the chancellor refusing to stay the proceedings. This was not a final decree. The right of appeal is created by statute, and in the absence of statutory authority therefor an interlocutory order entered in the progress of a cause is not appealable and may be reviewed only upon an appeal from the final order, judgment or decree. An order, judgment or decree is final only when it terminates the litigation between the

parties on the merits of the case. The order from which the appellant sought an appeal determined nothing concerning the merits of the controversy. It was merely interlocutory and no statute authorizes an appeal from the order. (The People v. Fisher, 335 Ill. 406, 411.)

The appeal must be dismissed and it is so ordered.

APPEAL DISMISSED.

Gridley, P. J., and Scanlan, J., concur.

parties or the merits of the cause. The order from which the appellant sought an appeal determined nothing concerning the merits of the controversy. It was merely interlocutory and no statute authorizes an appeal from the order. (The Fannie A. Hyder, 249 Ill. 406, 411.)

The appeal must be dismissed and it is so ordered.

Appeal dismissed.

Brindley, P. J., and Scanlan, J., concur.

35852

297

PEOPLE OF THE STATE OF ILLINOIS,
Complainant and Appellee,

v.

ARTHUR B. KNIGHT et al.,
Defendants.

ARTHUR B. KNIGHT,
Appellant.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

266 I.A. 598

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Superior court entered December 23, 1931, appointing a receiver of certain improved real estate, in a tax foreclosure suit brought under the Revenue Act (Section 253, Chapter 120, Cahill's Illinois Revised Statutes, 1931, p. 2359.)

The bill of complainant is signed in the name of the People by Henry M. Ashton, their attorney and solicitor, and is sworn to by him. It prays for an accounting, a foreclosure and the appointment of a receiver with authority to take possession of and manage the property under the direction of the court; to collect the rents and profits, and distribute the proceeds as the court may direct.

In the bill it is alleged that the People, upon order of the Board of County Commissioners of Cook county, represent that the general taxes for the years 1928 and 1929 were levied upon certain real estate described in the bill, and that said taxes so levied upon said real estate became due and were not paid and said real estate was thereupon forfeited to the State

paid and said real estate was therefore Particular to the terms
there to levied upon said real estate hereby due and were not
upon certain real estate described in the bill, and that said
that the general taxes for the years 1932 and 1933 were levied
of the Board of County Commissioners of said county, returned
the court may direct.

In the bill it is alleged that the People, upon entry
enjoins the rents and profits, and directs the process as
of and subject the property under the direction of the court; to
the application of a receiver with authority to take possession
sworn to by him. It prays for an accounting, a foreclosure and
People by Henry W. Clubb, their attorney and solicitor, and is

The bill of complaint is signed in the name of the

EX. JUSTICE ROBERT DECLARING THE DISPOSAL OF THE CAUSE.

This is an appeal from an interlocutory order of the
Superior Court entered December 22, 1931, sustaining a demurrer
of certain improved real estate, in a tax foreclosure suit brought
under the Revenue Act (Section 252, Chapter 120, Smith's Illinois
Revised Statutes, 1931, p. 2339.)

266 I.A. 598

of cook county.
CHIEF CLERK'S OFFICE
CIRCUIT COURT

ADAMS B. KNIGHT et al.,
Defendants.

v.

Complainant and Appellee,
HENRY W. CLUBB,
COUNTY OF COOK ET AL.,
ILLINOIS,

STATE OF

of Illinois for nonpayment of said taxes, and the accrued interest, costs, penalties and printer's fees due thereon, for two successive years, amounting to $3972.03; that said taxes are a prior and first lien upon said real estate, superior to any and all other liens, and that complainant is entitled to have said lien foreclosed; that said property is improved with a three story brick building, containing 42 apartments, fully rented with a gross rental of $2200 a month; that the said property remains forfeited to the State of Illinois for the years 1928 and 1929, and is in the possession of the owner (appellant) who is appropriating the returns therefrom to his own use, and when so appropriated, it will be difficult to reclaim them in order to satisfy the lien of complainant; that the remedy by sale under a decree of the court is uncertain for the reason that if such property were offered for sale, it is doubtful whether there would be bidders at such sale, as such bidder would not get possession of the property until two years had elapsed from the date of sale, and then the purchaser would get possession only in case there was no redemption; that in view of the fact said property is income bearing and that there are tenants in said building, it would be unjust to other taxpayers to furnish the occupants with free services of government during the two years of redemption.

In urging a reversal of the order appealed from appellant raises a number of questions. It will be necessary to refer to only one, "that the chancellor had no right of appoint a Receiver."

This identical contention was made in the case of People v. Straus et al., No. 35699, opinion this day filed, in which case we held that the chancellor was without authority to appoint a receiver in a tax foreclosure suit brought under section 253 of the Revenue Act.

For the reasons assigned in People v. Straus et al., supra, the interlocutory order of the Superior court of December 23, 1931, appointing Morris Isenberg as receiver of the premises, etc. is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

For the reasons assigned in Exhibit A, dated as of,

DECREE the interlocutory order of the chancellor dated of December 28, 1931, enjoining Amelia Leonard as receiver of the Delmiere etc. is vacated.

DECREED.

Oriskey, P. V.C. and Donahue, J.C. concur.

35853

PEOPLE OF THE STATE OF ILLINOIS,
Complainant and Appellee,

v.

ARTHUR B. KNIGHT et al.,
Defendants.

ARTHUR B. KNIGHT,
Appellant.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

266 I.A. 598

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Superior court entered December 23, 1931, appointing a receiver of certain improved real estate, in a tax foreclosure suit brought under the Revenue Act (Section 253, Chapter 120, Cahill's Illinois Revised Statutes, 1931, p. 2359.)

The bill of complaint is signed in the name of the People by Henry M. Ashton, their attorney and solicitor, and is sworn to by him. It prays for an accounting, a foreclosure and the appointment of a receiver with authority to take possession of and manage the property under the direction of the court; to collect the rents and profits, and distribute the proceeds as the court may direct.

In the bill it is alleged that the People, upon order of the Board of County Commissioners of Cook county, represent that the general taxes for the years 1928 and 1929, were levied upon certain real estate described in the bill, and that said taxes so levied upon said real estate became due and were not paid and said real estate was thereupon forfeited to the State of Illinois for nonpayment of said taxes, and the accrued interest, costs, penalties and printer's fees due thereon, for two successive years, amounting

IN THE STATE OF ILLINOIS.

Complainant and Appellee,

A.

VALENTE E. CHICOT et al.,

Defendants.

Appeal from

of Cook County.

HON. EDWARD E. PRITCHARD

PRESIDING JUSTICE.

MR. JUSTICE KENNON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Superior court entered December 30, 1931, sustaining a certain demurrer and setting, in a suit for foreclosure and partition of certain improved real estate, in a suit for foreclosure and partition of certain improved real estate, in a suit for foreclosure and partition of certain improved real estate

to $3981.97; that said taxes are a prior and first lien upon said real estate, superior to any and all other liens, and that complainant is entitled to have said lien foreclosed; that said property is improved with a three story brick building, containing 42 apartments, fully rented with a gross rental of $2200 a month; that the said property remains forfeited to the State of Illinois for the years 1928 and 1929, and is in the possession of the owner (appellant) who is appropriating the returns therefrom to his own use, and when so appropriated, it will be difficult to reclaim them in order to satisfy the lien of complainant; that the remedy by sale under a decree of the court is uncertain for the reason that if such property were offered for sale, it is doubtful whether there would be bidders at such sale, as such bidder would not get possession of the property until two years had elapsed from the date of sale, and then the purchaser would get possession only in case there was no redemption; that in view of the fact said property is income bearing and that there are tenants in said building, it would be unjust to other taxpayers to furnish the occupants with free services of government during the two years of redemption.

In urging a reversal of the order appealed from appellant raises a number of questions. It will be necessary to refer to only one, "that the chancellor had no right to appoint a Receiver."

This identical contention was made in the case of People vs. Straus et al., No. 35699, opinion this day filed, in which case we held that the chancellor was without authority to appoint a receiver in a tax foreclosure suit brought under section 253 of the Revenue Act.

the Revenue Act.

receives in a tax jeopardy case through normal execution may of course be paid that the communities are without authority to obtain a writ of injunction. See Dodge, Objector Risk for Life, 12 Army Navy Journal 1, 2.

Title restraint restriction are made in the case of Florida vs. Mellon, supra, "that the communities and no right to withhold a taxpayer." raises a number of questions. It will be necessary to take up this one, "that the communities and no right to withhold a taxpayer."

In making a recovery of the other objected item objections during the two years of redemption.

Before to figure the accounts with free salaries of Government there are remarks in said bulletin, it would be unjust to point out that in view of the fact said Federal is income period and that Government could for possession only in case there are no redemptions until the years and elapsed from the date of sale, and then the at such sale, no such right could not for possession of the Federal sale offered for sale, it is suggested whether sale could be higher decree of the court is important for the reason that it may Federal entirely the item of consideration upon the transfer of duty under a so abbreviated, it will be difficult to ascertain when in order to administrate the statute therefore to file tax map, and upon Large Title and Land, and it is the possession of the court (abolished) said Federal examine conducted by the Clerk of Circuits for the sale, until sumpy with a grand receipt of $2000 a deposit that the is complied with a three years period, commencing of execution has complied to the Federal Collector, and that said taxes list when such

For the reasons assigned in People v. Straus et al., supra, the interlocutory order of the Superior court of December 23, 1931, appointing Morris Isenberg as receiver of the premises, etc. is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

For the reasons explained in Florida Power & Light Co.
[illegible] the interlocutory order of the Appellate Court of Florida,
3d, 1977, affirming Berrie Leonard's motion to dismiss, is
affirmed in accordance.

Bridley, J., and Boulton, J., concur.

35388

M. C. MEAD,
Appellant,

v.

SARAH COYNE,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

3/A

266 I.A. 599[1]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered in favor of the plaintiff against the defendant for the sum of $1,660.75 upon a judgment note executed by the defendant. Thereafter, upon motion of the defendant, the defendant was given leave to plead, the judgment to stand as security. There was a trial before the court, with a jury, and a verdict returned finding the issues for the defendant. Judgment was entered upon the verdict and the plaintiff has appealed.

The plaintiff, in her declaration, alleged that on December 28, 1928, the defendant executed and delivered to the Northern Illinois Construction Company her promissory note wherein she promised to pay that company the sum of $1,785.55 in certain specified installments, with interest after maturity; that on January 2, 1929, the Construction Company indorsed, sold and delivered the note to the plaintiff, who thereby became the lawful owner of the same, and that although the note is past due and frequent demands have been made for payment the same is unpaid. The only plea filed by the defendant was one of the general issue. There is little dispute, if any, about the facts that are material to a determination of the instant appeal. On December 28, 1928, the cashier of the Cheltenham Trust & Savings Bank, where plaintiff

kept her bank account, called the plaintiff's brother on the telephone and stated that he was sending over two gentlemen who had certain paper to sell. Shortly thereafter the president and treasurer of the Northern Illinois Construction Company called at the place of business of the plaintiff and her brother and after a conversation with the brother the latter introduced them to the plaintiff. They left the note in question with the plaintiff. It was given to the Construction Company by the defendant in payment of labor and materials to be furnished under a contract which provided for certain improvements on a residence owned by the defendant. The note is an ordinary judgment note in the usual form. The defendant admits "that the note, standing alone, was a negotiable instrument within the meaning of the Negotiable Instruments Law." On the following day the plaintiff received, by mail, the contract between the Northern Illinois Construction Company and the defendant heretofore referred to; also a certificate, signed by the defendant, in which she states that the improvements provided for in the contract had been satisfactorily completed on December 20, 1928, and that "this statement is made to induce you to pay to the contractor the purchase price for my (our) note and contract. I (we) have paid contractor the first installment of $1.00 and having received notice of the assignment of contract to you, and the negotiation of my (our) note to you, hereby agree to pay the balance of $1785.55 due on note, direct to you at your office, in installments of $50.00 on the 20th day of each month commencing January 1929 until the full amount has been paid." Upon the receipt of these documents the plaintiff took the note, the contract and the certificate to the cashier of the Cheltenham bank and asked his advice in reference to the matter. The cashier examined the papers and stated to her that he was familiar with

them and they were all right and he advised plaintiff to purchase the note. On January 2, 1929, the president and treasurer of the Construction Company met the plaintiff and her brother at her place of business and after some talk the note was indorsed and delivered to the plaintiff; also the contract and certificate. The plaintiff then gave these officers two checks, payable to the Construction Company, one in the sum of $415.66 and the other in the sum of $1,369.89, which checks, it is admitted, were paid in due course by the Cheltenham Trust & Savings Bank. The plaintiff testified that at the time she purchased the paper she had no knowledge nor information that the contract for the improvements on the premises had not been completed and that she relied entirely upon the papers and the advice of the cashier of the bank in purchasing the note. The defendant testified, inter alia, over the objection of the plaintiff, that at the time that she issued the certificate in question the work was not completed under the contract and that about the middle of December she was advised by the Construction Company that it could not complete the work provided for in the contract and that she was compelled to employ another contractor to complete the work and that she paid the latter the sum of $1,173 to complete the work. It further appears that the Construction Company made five payments to the plaintiff as payments collected from the defendant on the note. These payments were made from January, 1929, to July, 1929, and aggregated $350. The defendant denied that she made any of these payments to the Construction Company.

A number of contentions are raised by the plaintiff in support of her argument that the verdict and judgment are against the law and the evidence. In our view of the matter it is necessary for us to consider one only. The plaintiff contends that the note is a negotiable instrument within the meaning of the Negotiable

Instruments act and that she was a holder in due course and held the note free of any defenses that the defendant might have had to the note in the hands of the Construction Company. This contention is clearly a meritorious one. The defendant concedes, as we have heretofore stated, that the note, standing alone, was a negotiable instrument within the meaning of the Negotiable Instruments law, but she argues, as we understand it, that the note and written contract must be considered as parts of a single contract and that when they are construed together the note ceases to be a negotiable instrument. There is no merit in this contention. See the late case of Balch v. English, 261 Ill. App. 29, wherein a like contention was raised and numerous authorities bearing upon the subject are cited. The defendant further contends that assuming that the note was a negotiable instrument, nevertheless, the plaintiff was not a holder in due course and did not hold the note free from any defenses that the defendant might have made to the note in the hands of the Construction Company. The defehdant argues that the plaintiff was not a holder in due course because she did not take the paper in good faith and that she had notice of infirmity in the instrument and defect in the title of the Construction Company, which negotiated it. The Negotiable Instruments act defines a holder in due course as one who takes the instrument under the following conditions: "1. That the instrument is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is

Instruments not and that she was a holder in due course and held the note free of any defenses that the defendant might have had to the extent of the amount of the Construction Company. This construction is clearly a meritorious one. The defendant concedes, as we have heretofore stated, that the note, standing alone, was a negotiable instrument within the meaning of the Negotiable Instruments Law, but she argues, as we understand it, that the note and written agreement be considered as parts of a single contract and that when they are construed together the note ceases to be a negotiable instrument. There is no merit in this contention. See the late case of Wolph v. Dwelling, 221 Ill. App. 89, wherein a like contention was raised and numerous authorities bearing upon the subject are cited. The defendant further contends that assuming that the note was a negotiable instrument, nevertheless, the plaintiff was not a holder in due course and did not hold the note free from any defenses that the defendant might have made to the note in the hands of the Construction Company. The defendant argues that the plaintiff was not a holder in due course because she did not take the paper in good faith and that she had notice of infirmity in the instrument and defect in the title of the Construction Company, which appeared on it. The Negotiable Instruments Act defines a holder in due course as one who takes the instrument under the following conditions: 1. That the instrument is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is

negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." (Sec. 56, ch. 98, Callaghan's Ill. St. Ann., Vol. 6, p. 5354.) "Only bad faith will defeat the title of the endorsee of commercial paper taken before maturity, for value and without knowledge of any defense thereto. Mere suspicion, the knowledge of circumstances calculated to excite suspicion, or even gross negligence of the endorsee in acquiring the paper, will not defeat his title." (Kavanagh v. Bank of America, 239 Ill. 404, 408. See also Kuolt v. Canright, 202 Ill. App. 502, 506; Page v. Hallam, 212 Ill. App. 462, 468; Bowen v. Croarkin, 255 Ill. App. 622.)

After a careful consideration of the facts and circumstances in this case we have reached the conclusion that the plaintiff proved that she was a bona fide holder of the note, and we find no facts or circumstances in evidence from which a fair and reasonable inference might be reasonably drawn that she was not a holder in due course. It is perfectly clear from the record that the defendant prevailed upon her theory that "the plaintiff was not a holder in due course, and did not hold the note free from any defenses that the defendant might have made to the note in the hands of the Northern Illinois Construction Company," and that "the consideration of the note had in fact failed, and that therefore the plaintiff had no right of recovery." If we are correct in our conclusion that the plaintiff was a holder in due course of the note, it follows that the verdict and judgment in this case cannot stand.

The judgment of the Superior court of Cook county is reversed, and as the case was tried before a jury the cause will be remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

negotiated would have had actual knowledge of the infirmity or defect, or knowledge of such facts that his ceasing to relying the instrument amounted to bad faith." (Ibid. 3C, ca. 3d, Gallagher's III. 3d. Ann., Vol. 6, p. 3338.) "Only bad faith will defeat the title of the endorsee of commercial paper taken before maturity, for value and without knowledge of any defense thereto. Here suspicion, the knowledge of circumstances sufficient to excite suspicion, or even gross negligence of the endorsee in accepting the paper, will not defeat his title." (Farnsworth v. Bank of America, 329 Ill. 444, 452. See also Eagle v. Gerlach, 348 Ill. App. 602, 606; Hart v. Dolton, 312 Ill. App. 424; 438; Byron v. Crowell, 288 Ill. App. 322.)

After a careful consideration of the facts and circumstances in this case we have reached the conclusion that the plaintiff proved that she was a bona fide holder of the note, and we find no facts or circumstances in evidence from which a fair and reasonable inference might be reasonably drawn that she was not a holder in due course. It is plaintiff's first duty to prove that defendant prevailed upon her wherby that "the plaintiff was not a holder in due course, and did not hold the note free from any defenses that the defendant might have made to the note in the hands of the American Illinois Construction Company," and that "the consideration if the note was in fact failed, and that therefore the plaintiff had no right of recovery." If we are correct in our conclusion that the plaintiff was a holder in due course of the note, it follows that the verdict and judgment in this case cannot stand.

The judgment of the Superior court of Cook county is reversed, and as the case was tried before a jury the cause will be remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Burner, J., concur.

35412

EDWARD H. MORRIS, Receiver for Binga State Bank,
Appellee,

v.

HARRY A. FRIEDMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

32 F

266 I.A. 599 2

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Edward H. Morris, Receiver for Binga State Bank, caused a judgment by confession to be entered for $1,775.10, against the defendant, Harry A. Friedman, on a promissory note for $1,500, signed by the defendant and made payable to Binga State Bank. The note is dated October 15, 1929. It appears that the state auditor took possession of the bank August 1, 1930, and that the receiver was appointed about December 1, 1930. The defendant entered a motion that the judgment be vacated and set aside, and in support of the same filed a verified petition which set up, inter alia, "that there was no consideration for the execution of the note, and that this defendant executed the note for accommodation purposes only, and that the Binga State Bank was to hold the note for the purpose of a bank record and for no other purposes whatsoever; that on or about May 22nd, 1930 the Binga State Bank offered to sell this defendant bank stock in the sum of $1,500, and that this defendant did pay to and did give to the Binga State Bank the sum of $1,500 for the said stock, but that the said bank failed and refused to deliver the said bank stock to this defendant; that the bank on October 15th, 1929 returned to this defendant the sum of $1,500 and represented at that time that if he would sign a note evidencing the said payment, that the same

HENRY V. FRIEDMAN, Appellant,

-A-

EDWARD J. DOYLE, Receiver for Dingo State Bank, Appellee.

APPEAL FROM DISTRICT COURT OF CHICOPEE.

Mr. JUSTICE SCHMIDT DELIVERS THE OPINION OF THE COURT.

The plaintiff, Henry V. Friedman, brought his action to recover $1,750.00, against the defendant, Henry -- Friedman, on a promissory note for $1,000, signed by the defendant and made payable to Dingo State Bank. The note is dated October 1X, 1928, It appears that the state auditor took possession of the bank August 1, 1929, and that the receiver was appointed about November 1, 1929. The defendant entered a motion that the judgment be vacated and set aside, and in support of the same filed a verified petition which set up, inter alia, that there was no consideration for the execution of the note, and that said defendant received the note for accommodation purposes only, and that the Dingo State Bank was to hold the same for the purpose of a bank record and for no other purposes whatsoever; that on or about May 22nd, 1929 the said bank failed and refused to deliver the said bank stock to the Dingo State Bank the sum of $1,000 for the said stock, but that the said bank failed and refused to deliver the said bank stock to this defendant the sum of $1,000 and represented at that time that defendants that the bank on December 12th, 1929 returned to the Dingo State Bank the sum of $1,000 for the said stock, but that sum of $1,000, and that this defendant did pay to the said Dingo State Bank which signed a note evidencing the said payment, that the same

2661 A. 339

would be used merely for the purpose of a bank record to show the return of the said $1,500 to this defendant and for no other purpose whatsoever." The defendant was given leave to appear and make defense to the claim, the judgment to stand as security, and that the petition and affidavit stand as the affidavit of merits. The case was tried by the court, without a jury, and there was a final judgment entered "that the judgment rendered herein against the defendant * * * for the sum of $1,775.10 be and the same is hereby reduced to the sum of $1,544.10, for which amount said judgment is confirmed," etc. The defendant has appealed.

Upon the trial of the cause the plaintiff admitted that if C. N. Langston were present in court he would testify that on May 22, 1928, and prior to that date, he was the cashier of the Binga State Bank; that prior to May 22, 1928, the defendant was a depositor in the bank; that prior to that date the witness and Jesse Binga, the president of the bank, had conversations with the defendant concerning the purchase of some shares of stock in the bank by the defendant; that on May 22, 1928, the defendant agreed to purchase ten shares of stock and that he then and there paid for the same the sum of $1,500, and that a receipt for the $1,500 was then delivered to the defendant; that the ten shares of stock were never issued, tendered or delivered to the defendant; that from time to time the defendant demanded the shares of stock or the return of his money; that on October 15, 1929, the defendant asked for the return of the $1,500 and that the witness told him that if he would sign a note for $1,500 he would return the $1,500 to him and that there would be no interest charged the defendant on the note, which would be used for a bank record only, and that as soon as he (Langston) took the matter up with the president of the

room as he (Langston) took the matter up with the president of the
the note, which would be used for a bank record only, and that as
to him and that there would be no interest charged the defendant on
that if he would sign a note for $1,800 he would return the $1,800
asked for the return of the $1,800 and that the witness told him
the return of his money; that on October 10, 1928, the defendant
came from time to time the defendant demanded the shares of stock or
were never issued, tendered or delivered to the defendant; that
was then delivered to the defendant; that the ten shares of stock
for the sum the sum of $1,800, and that a receipt for the $1,800
to purchase ten shares of stock and that he then and there paid
them by the defendant; that on May 22, 1928, the defendant entered
defendant concerning the purchase of some shares of stock in the
Iowa State, the president of the bank, had conversations with the
depositor in the bank; that prior to that date the witness and
Union State Bank; that prior to May 22, 1928, the defendant was a
May 22, 1928, and prior to that date, he was the cashier of the
it C. B. Langston were present in court he would testify that on

Upon the trial of the cause the plaintiff admitted that
said judgment is outstanding," etc. The defendant has appealed.
same is hereby reduced to the sum of $1,644.10, for which amount
against the defendant * * * for the sum of $1,777.10 be and the
was a final judgment entered "that the judgment rendered herein
merits. The case was tried by the court, without a jury, and there
and that the petition and affidavit stand as the affidavit of
and make defense to the claim, the judgment to stand as security,
purpose whatsoever." The defendant was given leave to appear
return of the said $1,800 to this defendant and for no other
would be used merely for the purpose of a bank record to show the

bank the note would be destroyed; that from the time of the execution of the note until the receiver was appointed for the bank the defendant was a depositor in the bank, and that at no time was there any interest charge made against the defendant on the $1,500 note. The defendant testified that prior to May 22, 1928, he had been a depositor in the bank and that during that time he had had "various loan transactions" with it; that he knew C. N. Langston, the cashier, and Jesse Binga, the president, of the bank; that about May 22, 1928, he had a conference with them in reference to the purchase of ten shares of stock in the bank and that on that date he entered into a contract to purchase the said shares and paid the bank $1,500 in payment of the same, and that he then received from the bank a receipt for the money; that the bank never delivered to him the ten shares of stock although he made repeated demands for the delivery of the same; that during the month of October, 1928, he demanded of the bank the return of his $1,500 and that the cashier said to him: "I can't give you it, can't give you the total, but if you will sign a note I will dispose of the stock, and I will return you the note as soon as I dispose of it, and I wont charge you any interest;" that thereafter the defendant executed the note upon which judgment was confessed; that after the execution of this note he several times requested the cashier of the bank to return the same; that on several occasions the cashier was ready to give him the note but after the cashier talked with the president of the bank on the telephone he would then tell the defendant to come back in a day or two to get the note; that he thereafter called several times to get the note but was never given the same although the president of the bank on several occasions stated that he was ready to give it to him; that no interest was ever demanded on the note nor was his bank account

no interest was ever demanded on the note nor the Bank ever made
any demands stated that he was ready to give it to him that
but was never given the same although the Secretary of the Bank on
the note) that he thereafter called several times to put the note
would then tell the defendant to come back on a day or two to get
cashier talked with the President of the Bank on the telephone he
conversations the cashier was ready to give him the note but after the
reclaimed the deposit of the Bank in return the same; that on several
learned; that after the execution of this note he several times
after the defendant executed the note upon inquiries are con-
as I dispose of it" and I must operate for not interest)" that there-
I will dispose of the stock, and I will recommission the note as soon
give you it" can't give you the cash, but if you will give a note
return of his $3,500 and that the cashier said to him: "I won't
that during the month of October, 1930, he demanded of the Bank the
although he made repeated demands for the delivery of the same;
money) that the Bank never delivered to him the ten shares of stock
the same, and that he then received from the Bank a receipt for the
to guarantee the said shares and paid the Bank $3,500 in payment of
of stock in the Bank but on that date he misread into a conference
had a conference with them in reference to the purchase of ten shares
lease thing, the president of the Bank; that about July 30, 1929, he
transactions with it; that he knew [illegible] the cashier, and
in the Bank and that during that time he had been a depositor
defendant testified that prior to July 30, 1929, he had been a depositor
interest stocks made against the defendant on the 13,500 note. The
was not a depositor in the Bank, and that at no time was any
of the note until the receiver was delivered for the Bank the defend-
ant the note would be cancelled; that then the time of the execution

ever charged with any interest on the note although he was a depositor until the bank was closed; that the cashier told him when he signed the note that it was to be used for a bank record only and that as soon as the cashier took the matter of the note up with the president of the bank the note would be destroyed. Neither Langston nor Binga testified and the plaintiff did not see fit to offer any evidence to sustain its theory that the note was executed and delivered to the bank for the purpose of making an appearance of assets so as to deceive the bank examiner and enable the bank to continue in business.

The defendant contends that the finding and judgment of the court are against the evidence and the law. After a careful consideration of the record we have reached the conclusion that this contention is a meritorious one. The finding and judgment of the trial court were based upon the rule laid down in Golden v. Cervenka, 278 Ill. 409, and Niblack v. Farley, 286 Ill. 536, that where notes were executed to a bank for the purpose of making an appearance of assets so as to deceive the bank examiner and enable the bank to continue in business, although the circumstances may have been such that the bank itself could not have collected the securities, the receiver, representing the creditors, might maintain an action, and the makers of the notes would be estopped, upon the insolvency of the bank, to allege want of consideration. In these two cases, and in others that have since followed the rule therein announced, it clearly appears that the note or notes in question were given for the purpose of enabling the bank to continue in business by perpetrating a fraud upon the bank examiner, to the injury of the creditors of the bank, and it was held that where a suit was brought on a note or notes by a receiver who was collecting a bank's assets and winding up its affairs for the

benefit of its creditors, "it would be contrary to public policy and good morals to permit defendant to take advantage of the fraudulent agreement with the bank as against the rights of creditors." (Niblack v. Farley, supra, p. 540.) In the instant case it does not appear from the proof that the note was given by the defendant for any fraudulent purpose, and we cannot presume that the transaction was a fraudulent one. The late case of McComb v. Jacobs, 256 Ill. App. 141, is in point. The mere fact that the transaction in question may not be free from suspicion is not sufficient to make out a prima facie showing that the note was given for any fraudulent purpose.

After a careful consideration of this appeal we have reached the conclusion that justice requires that this case be tried again, and we are therefore remanding the cause so that the plaintiff may have another opportunity to sustain its claim, if it can. The defendant also contends, and with some force, that for aught that appears in this record the receiver holds ample assets to pay all of the creditors and that if such is the case no creditor could have been injured by the giving of the note in question, and for that reason the present claim cannot be sustained. The plaintiff, upon a retrial of the cause, will have an opportunity to meet this contention.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

benefit of the creditor, "it would be contrary to public policy and good morals to permit [illegible] to take advantage of the fraudulent agreement with the bank as against the claims of creditors." (Bishop v. Taylor, supra, p. 640.) In the instant case it does not appear from the proof that the note was given by the defendant for any fraudulent purpose, and we cannot presume that the transaction was a fraudulent one. The late case of Young v. Jennings, 206 Ill. App. 141, is in point. The mere fact that the transaction in question may not be free from suspicion is not sufficient to make out a prima facie showing that the note was given for any fraudulent purpose.

After a careful consideration of this appeal we have reached the conclusion that justice requires that this case be tried again, and we are therefore remanding the cause so that the plaintiff may have another opportunity to sustain its claim, if it can. The defendant also contends, and with good force, that for ought that appears in this record the receiver holds ample assets to pay all of the creditors and that if such is the case no creditor could have been injured by the giving of the note in question, and for that reason the present claim cannot be sustained. The plaintiff, upon a retrial of the cause, will have an opportunity to meet this contention.

The judgment of the municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Crilly, J., and Kenner, J., concur.

35428

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation, (complainant),
Appellee,

v.

DAVID PAUL HORGER et al.,
Defendants.

DR. JOHN W. O'SHEA,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

266 I.A. 599

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Hancock Mutual Life Insurance Company, a corporation, filed a bill of interpleader making David Paul Horger and Dr. John W. O'Shea defendants. After the defendants had filed their answers an order was entered directing the complainant to pay the proceeds of a certain policy to the clerk of the court, there to remain subject to the further orders of the court, and that the defendants, David Paul Horger and Dr. John W. O'Shea interplead between themselves for the proceeds of the policy, and that upon the deposit by the complainant of the said proceeds it be dismissed out of the case. The cause was then referred to a master in chancery, who filed a report finding that the equities were with the defendant David Paul Horger and recommending that a decree be entered in accordance with the finding. The chancellor overruled the exceptions to the master's report and entered a decree in favor of the defendant Horger, from which the defendant O'Shea has appealed.

On March 25, 1925, the complainant, hereinafter referred to as the Insurance Company, executed and delivered a policy of life insurance upon the life of Mary M. Hennigan, wherein the Insurance

266134.599

Company agreed, inter alia, to pay, upon the death of the insured, the sum of $1,000 to Patrick Hennigan, her brother, who was designated as beneficiary in the policy, the insured reserving, however, the right to change the beneficiary. After the issuance of the policy, the insured married the defendant Horger, and pursuant to her request the beneficiary under the policy was changed from Patrick Hennigan to the defendant Horger, and the change was duly endorsed on the policy by the Insurance Company on October 3, 1927. After the marriage the defendant Horger and the insured lived together as husband and wife until her last illness. From the time of the endorsement of the change of beneficiary until the death of the deceased the policy was in the possession of the defendant Horger, who was at all times upon friendly terms with his wife, the insured, and it appears that no request or demand was ever made upon him by her to surrender the policy. During the last illness of the insured and while she was confined in a hospital under the care of the defendant O'Shea, the insured attempted to change her beneficiary. On October 23, 1929, upon a form provided by the Insurance Company, she nominated Dr. John W. O'Shea to be the beneficiary of the policy. Upon this form, in bold face type, appears the following: "Notice to Policyholders No Change of Beneficiary is Binding on the Company Unless Filed at the Home Office and Endorsed on the Policy by the President or Secretary." On the day following the execution of that nomination the insured, also upon a form provided by the Insurance Company, signed a second nomination by which she named the defendant O'Shea, as a "second cousin of the insured," to be the beneficiary of the policy. It is admitted that the defendant O'Shea was not a second cousin of the insured and bore no relationship to her. The policy provides, inter alia, as follows: "The insured may change the beneficiary

Index Files, as [illegible]: "The Imperial may change the beneficiary
the insured may have to relentlessly to her. The policy provide
is mentioned that the retirement clause was not a normal expense of
normal of the Imperial," it be the beneficiary of the policy. If
known upon a form prepared by the Insurance Company, stating a change
on the day initiated the execution at last mention the insured,
dlike one endorsed on the policy by the insurance to necessary."
Beneficiary is binding on the Company unless filed at the home
office the following: Notice to Policyholders to Change of
Beneficiary of the policy. Upon this form, in bold face type,
Insurance Company, who mentioned in, type a form prepared by the
Beneficiary. On notice of, 1939, upon a form prepared by the
Home of the Insurance Company, the insured attempted to change the
of the insurance was void, by not received in a duplicate copy the
Home Office by mail to accompany the policy. During the last fifteen
the insured," and it appears that in lapsed at least one year prior
Mayer, who was at all times upon friendly terms with Eli-ely,
the insured the policy was in the possession of the defendant
of the endorsement of the change at Imperial until the death as
Mayer on the policy of the insurance in the amount of $5,000.
after the execution the retirement Budget and the insured Life Co-
operated on the policy by the insurance company on November 3, 1939.
Mayer enrolled in the retirement Budget, and the change was duly
to Mrs Mayer the beneficiary under the policy was changed from
of the Policy, the insurer received the endorsement Budget, and returned
Mayer, the right to change the beneficiary. After the insured
beneficiary is beneficiary to the policy, the insured executed,
the sum of $5,000 on Eyeing Insurance, but October, who was
Company entered. Index Files by mail, upon the death of the insured,

from time to time * * * by written request upon the blanks of the company filed at the home office, but such change shall take effect only upon endorsement hereon." (Italics ours.) The insured died October 30, 1929. The master found that the policy was never delivered to the Insurance Company after the nomination of the defendant O'Shea had been made, and that "before the new nomination could be endorsed on the policy as required by its terms the insured died, and that the insurance company at no time consented to the change of the beneficiary in the manner provided by the terms of the policy." The master further found that "during all the time subsequent to the endorsement of said change of beneficiary from Patrick Hennigan to the defendant, David Paul Horger, the said policy of insurance was in the possession of the defendant, David Paul Horger, who was at all times upon friendly terms with the insured, his wife, but no request or demand was ever made upon said defendant, David Paul Horger, to surrender said policy of insurance to the insured so that she might effectuate any further change of beneficiary," and that "the failure to secure said policy and to deliver same to the company was not explained in any way." All these findings are fully sustained by the proof.

The appellant contends that "the change of beneficiary to Dr. John W. O'Shea was effected even though said change was not endorsed on the policy of the insurance company." This contention is settled, and adversely to the appellant, in the case of Freund v. Freund, 218 Ill. 189. See also the very late case of McKidowney v. Metropolitan Ins. Co., 347 Ill. 66, wherein the court follows the rule laid down in the Freund case. The appellant argues that the latter case does not apply, as the decision was based solely upon a New York statute. There is no merit in this argument. While it is true that the court holds that under the statute the consent of the

from time to time * * * by written request upon the blanks of the company filed at the home office, but such change shall take effect only upon endorsement hereon." (Italics ours.) The insured died October 20, 1930. The master found that the policy was never delivered to the insurance company after the execution of the defendant "O'Shea had been made, and thus "before the consummation could be endorsed on the policy as required by the terms the insured died, and that the insurance company at no time consented to the change of the beneficiary in the manner provided by the terms of the policy." The master further found that "during all the time subsequent to the endorsement of said change of beneficiary from Patrick Brennigan to the defendant, Lewis Paul Berger, the said policy of insurance was in the possession of the defendant, Lewis Paul Berger, who was at all times upon friendly terms with the insured, his wife, but no request or demand was ever made upon said defendant, Lewis Paul Berger, to surrender said policy of insurance to the insured so that she might effectuate any further change of beneficiary," and that "the failure to secure said policy and to deliver same to the company was not explained in any way." All these findings are fully sustained by the proof.

The appellant contends that "the change of beneficiary to Dr. John J. O'Shea was effected even though said change was not endorsed on the policy of the insurance company." This contention is settled, and adversely to the appellant, in the case of Freund v. Freund, 218 Ill. 189. See also the very late case of Kallaugher v. Metropolitan Ins. Co., 347 Ill. 64, wherein the court follows the rule laid down in the Freund case. The appellant argues that the latter case does not apply, as the decision was based solely upon a New York statute. There is no merit in this argument. While it is true that the court holds that under the statute the consent of the

company to the change was necessary, it also holds that in addition to the statutory requirement the policy provided that the change of beneficiary shall not take effect until endorsed on the policy by the company at its home office and that "this is a plain and clear contract between the company and the assured, and we see no reason why the contract is not valid and should not be enforced as made." Moreover, in McEldowney v. Metropolitan Ins. Co. no question of statutory requirement appears to have been present and the decision is based upon the provisions of the policy.

The appellant states that the insured sent the policy to the Insurance Company and that the failure of the latter to endorse the policy was due to the fault of the Insurance Company. This statement is based solely upon the fact that the defendant Horger agreed before the master that "if an official for the complainant were called to testify he would testify that when the insured was in the hospital in her last illness she signed nomination forms attempting to substitute for her husband, as beneficiary, Dr. John W. O'Shea, and that before this new nomination could be endorsed on the policy as required by its terms Mrs. Horger died." The appellant argues, "this (agreement), of course, admits that the insurance company received the change of beneficiary forms and the policy. It merely received them too late to endorse the change of beneficiary on the policy, i. e. Mrs. Horger died before the company had a chance to make said endorsement." The agreement makes no such admission and in view of the undisputed facts in this case we are somewhat surprised that counsel should see fit to make such an argument. The master found, and the undisputed proof shows, that the policy was never out of the possession of the defendant Horger from the time that he was given the same until the death of the insured, and that the insured never made any demand upon Horger for the return

of the policy. During the hearing before the master, the appellant never claimed that the policy was sent to the Insurance Company. The findings just mentioned were not even objected to by the appellant. In fact, one of his major objections was "that the Master failed to find that it would have been useless on the part of Mrs. Mary M. Horger to make any request or demand upon the said David Paul Horger to surrender the said policy of insurance to the insured so that she might effectuate any further change of beneficiary," and the position of the appellant before the master was that the endorsement by the Insurance Company was a mere ministerial act and could be dispensed with.

The appellant also contends that the defendant Horger cannot raise the objection that the change of beneficiary was not endorsed on the policy, and that the Insurance Company is the only party who could raise that point and that it has not done so. There is no merit in this contention. (See Freund v. Freund, supra, 206-8.)

In the instant case there was no proof of wrongdoing on the part of the defendant Horger or neglect of the Insurance Company.

The decree of the Circuit court of Cook county will be affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

35504

LEE TIRE & RUBBER CO., OF NEW YORK, a corporation,
Appellant,

v.

ANTHONY J. TOREN et al.,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 599

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a suit in assumpsit the jury returned a verdict finding the issues for the defendants. The plaintiff has appealed from a judgment entered upon the verdict.

The defendants have heretofore filed a motion to strike the bill of exceptions from the record and a consideration of the same was reserved until the final hearing. There is no merit in the motion and it will be denied.

The plaintiff's declaration consisted of the common counts, to which was attached a verified affidavit of claim which contains, inter alia, the following: "That the demand of the plaintiff is for the balance due for goods, wares and merchandise sold and delivered to the defendants at their special instance and request; and that there is now due the plaintiff herein from said defendants, after allowing all just credits, deductions and set-offs to said defendants, the sum of $18,167.05 together with interest at six per cent per annum from October, 1930, (as per itemized statement attached hereto.)" In the itemized statement of account are included approximately 487 items of merchandise furnished by the plaintiff to the defendants, and it also appears from the account that after allowing the defendants certain credits and set-offs there is a balance due the plaintiff of $18,167.05. The defendants

filed a plea of non assumpsit and an affidavit of merits which avers, inter alia, that the merchandise was sold and delivered under a contract between the parties and that the plaintiff sold tires to other dealers in the city of Chicago, contrary to express provisions of the contract, and that because of this breach of the contract the defendants were greatly damaged and claim recoupment for the same, and that the total amount of credit deductions to which the defendants are entitled is more than sufficient to equal the total amount of the claim made by the plaintiff. A copy of the contract between the parties is attached to the affidavit and made a part of the same.

The plaintiff introduced evidence to the effect that under the contract it sold and delivered to the defendants tires and tubes, between November 1, 1929, and October 31, 1930, and that after allowing the defendants all just credits and set-offs there is due the plaintiff from the defendants the sum of $18,167.05. It clearly appears from the evidence that the plaintiff made approximately 400 deliveries of merchandise to the defendants. While the defendants made an effort to prove that they had not received all of the merchandise which the plaintiff claimed to have delivered, there is much force in the contention of the latter that this claim of the defendants is not sustained by any satisfactory evidence. However, we do not deem it necessary, in the determination of this case, to determine this disputed question.

The defendants contend that the court committed reversible error in giving to the jury the following instructions:

"The Court instructs the jury that if you find from the evidence that the plaintiff sold tires to other parties or distributors, or persons in the City of Chicago, and further find that said sale was a violation of the contract between the parties, then you should find for the defendants.

"The Court instructs the jury that if you find from the evidence that a contract was entered into between the plaintiff and the defendants for the defendants to be the exclusive agents

filed a plea of non assumpsit and an affidavit of merits which avers, inter alia, that the merchandise was sold and delivered under a contract between the parties and that the plaintiff sold tires to other dealers in the city of Chicago, contrary to express provisions of the contract, and that because of this breach of the contract the defendants were greatly damaged and claim recoupment for the same, and that the total amount of credit deductions to which the defendants are entitled is more than sufficient to equal the total amount of the claim made by the plaintiff. A copy of the contract between the parties is attached to the affidavit and made a part of the same.

The plaintiff introduced evidence to the effect that under the contract it sold and delivered to the defendants tires and tubes, between November 1, 1929, and January 11, 1930, and that after allowing the defendants all just credits and set-offs there is due the plaintiff from the defendants the sum of $12,167.01. It clearly appears from the evidence that the plaintiff made approximately 400 deliveries of merchandise to the defendants. While the defendants made an effort to prove that they had not received all of the merchandise which the plaintiff claimed to have delivered, there is much force in the contention of the latter that this claim of the defendants is not sustained by any satisfactory evidence. However, we do not deem it necessary, in the determination of this case, to determine this disputed question.

The defendants contend that the court committed reversible error in giving to the jury the following instructions:

"The Court instructs the jury that if you find from the evidence that the plaintiff sold tires to other dealers or distributors, or persons in the City of Chicago, and further find that said sale was a violation of the contract between the parties, then you should find for the defendants.

"The Court instructs the jury that if you find from the evidence that a contract was entered into between the plaintiff and the defendants for the defendants to be the exclusive agents

or distributors for the plaintiff, and if you further find that the plaintiff violated the exclusive agency or contract, then you must find the issues against the plaintiff.

"The Court instructs the jury that if you find from the evidence that the plaintiff sold tires to other dealers in violation of their contract with the defendants, sold tires to other dealers in the City of Chicago, during the existence of the contract between the parties, and advised dealers and other persons that they could obtain tires from the plaintiff and did so obtain the tires from the plaintiff or the plaintiff's agents, then you must find the issues against the plaintiff."

The contention is clearly a meritorious one. The contract between the parties provided that the defendants should have the exclusive agency of certain kinds and sizes of tires within the city of Chicago, and the defendants offered evidence which they claim shows that the plaintiff breached this provision by selling certain tires of a kind contemplated by the contract to other dealers. The plaintiff contends that in view of a certain agreement entered into between the parties on January 16, 1930, all differences that then existed between them were settled and that the defendants failed to show by any competent evidence any breach subsequent to that agreement, but it is unnecessary for us to consider that contention. Even though the defendants proved a breach of the contract by the plaintiff, that fact, alone, would not excuse them from paying for the merchandise they had received and kept. If a defendant proves that the plaintiff did not carry out the terms of a contract and that the defendant has sustained damages by reason thereof, he has the right to recoup for all damages he has sustained thereby. (See Spiro v. Cable, 248 Ill. App. 343, 348-9, and cases cited therein. See also Black Diamond Fuel Co. v. Illinois F. & P. Co., 219 Ill. App. 150, 157-9.) In the instant case the deliveries by the plaintfff were made over a somewhat extended period of time. The defendants never attempted to cancel the contract nor to return the merchandise they had received, and they continued to order and receive merchandise, with knowledge of an alleged breach of the contract by the plaintiff,

"The Court instructs the jury that if you find from the evidence that the plaintiff quit cities to open dealers in Indian of their contract with the defendants, more times to solicit dealers in the City of Chicago, during the existence of the contract between the parties, and obtained dealers and other persons that such should stave from the plaintiff and did so obtain the time from the instant of the plaintiff's service, then you must find the issues against the plaintiff."

The contention is clearly a meritorious one. The contract between the parties provided that the salesmen should have the exclusive agency at certain times and places of cities within the city of Chicago, and the defendants offered evidence which they claim that the plaintiff pursued this privilege by selling vacuum cleaners of a kind contemplated by the contract to other dealers. The plaintiff contends that in view of a certain agreement entered into between the parties on January 14, 1930, all difficulties that then existed between them were settled and that the differences limited to what by only competent evidence any breach constituting to the contract, but it is unnecessary for us to consider that contention. Even though the defendants proved a breach of the contract by the plaintiff, that fact, alone, would not cause them from paying for the merchandise they had received and kept. If a defendant proves that the plaintiff did not carry out the terms of a contract and that the defendant has sustained damages by reason thereof, he has the right to recoup for all damages he has sustained thereby. (See Smith v. Cohen, 249 Ill. App. 427, 433-9, and cases cited therein. See also Black Diamond Fuel Co. v. Illinois P. & P. Co., 326 Ill. App. 130, 137-9.) In the instant case the duties by the plaintiff were more than a somewhat extended period of time. The defendants never attempted to cancel the contract nor to relieve the relationship they had created, and they continued to enjoy the exclusive agency at certain times and places of cities within the city of Chicago, and the defendants offered evidence which they claim that the plaintiff pursued this privilege by selling vacuum cleaners of a kind contemplated by the contract to other dealers. The plaintiff contends that in view of a certain agreement entered into between the parties on January 14, 1930, all difficulties that then existed between them were settled and that the differences limited to what by only competent evidence any breach constituting to the contract, but it is unnecessary for us to consider that contention. Even though the defendants proved a breach of the contract by the plaintiff, that fact, alone, would not cause them from paying for the merchandise they had received and kept. If a defendant proves that the plaintiff did not carry out the terms of a contract and that the defendant has sustained damages by reason thereof, he has the right to recoup for all damages he has sustained thereby. (See Smith v. Cohen, 249 Ill. App. 427, 433-9, and cases cited therein. See also Black Diamond Fuel Co. v. Illinois P. & P. Co., 326 Ill. App. 130, 137-9.) In the instant case the duties by the plaintiff were more than a somewhat extended period of time. The defendants never attempted to cancel the contract nor to relieve the relationship they had created, and they continued to enjoy the exclusive agency at certain times and places of cities within the city of Chicago, and the defendants offered evidence which they claim that the plaintiff pursued this privilege by selling vacuum cleaners of a kind contemplated by the contract to other dealers. The plaintiff contends that in view of a certain agreement entered into between the parties on January 14, 1930, all difficulties that then existed between them were settled and that the differences limited to what by only competent evidence any breach constituting to the contract, but it is unnecessary for us to consider that contention. Even though the defendants proved a breach of the contract by the plaintiff, that fact, alone, would not cause them from paying for the merchandise they had received and kept. If a defendant proves that the plaintiff did not carry out the terms of a contract and that the defendant has sustained damages by reason thereof, he has the right to recoup for all damages he has sustained thereby. (See Smith v. Cohen, 249 Ill. App. 427, 433-9, and cases cited therein. See also Black Diamond Fuel Co. v. Illinois P. & P. Co., 326 Ill. App. 130, 137-9.) In the instant case the duties by the plaintiff

and the contention that they can avoid payment for all of the goods delivered to them merely by showing an alleged breach of the contract by the plaintiff is so unconscionable that it hardly requires serious consideration. In the oral arguments of this case counsel for the defendants practically conceded that the court erred in giving the instructions in question but he argued that the instructions considered as a whole fully and fairly announced the rules of law applicable to the case and therefore the giving of the instructions in question did not constitute reversible error. It is sufficient to say, in answer to this argument, that the giving of erroneous instructions which direct a verdict for a party cannot be cured by other instructions. The instructions in question direct a verdict if the jury find that the plaintiff had breached the contract.

The court also erred in giving the following instruction to the jury:

"The Court instructs the jury that as a matter of law, the plaintiff Lee Tire & Rubber Company, cannot recover under the declaration in this case, unless it has shown by a preponderance of all the evidence in the case, a contract fully performed on its part."

As this case may be tried again we deem it necessary to refer to a contention of the plaintiff that the court erred in permitting the defendant Joseph Toren, over the objection of the plaintiff, to testify to conversations Toren claimed to have had with a Mr. Beindorf, who had been a salesman of the plaintiff for a number of years. The testimony was to the effect that Beindorf stated to the witness that the plaintiff was making as many deliveries of tires in Chicago to other people as it was to the defendants and that the defendants should cancel their contract with the plaintiff and "take on some other tires;" that only Mr. Beindorf and the witness were present at the time of the statements. When this testimony was offered the plaintiff objected to the introduction

while testimony was allowed the plaintiff objected to the introduction and the witness nevertheless presented the statements. Then the plaintiff and "take on some other street" that only Mr. Bothwell spoke and that the defendants should counsel their contract with the other of sites in Chicago to other people as it was to the defendants objected to the witness that the plaintiff was waiting on many difficulties with a Mr. Bothwell, who had been a salesman of the plaintiff for a number of years. The testimony was to the effect that Bothwell permitting the defendant Joseph Yates, were the solicitor of the plaintiff, to testify to conversations taken claimed to have had later to a conclusion of the plaintiff that the court erred in

We this case may be tried again we deem it necessary to

> "The Court instructs the jury that as a matter of law, the plaintiff (see file 2 Chapter Complaint, amount recovery under the declaration in this case, unless it has shown by a preponderance of all the evidence in the case, a contract fully performed on its part."

to the jury:

The court also erred in giving the following instruction

> a verdict if the jury find that the plaintiff had breached the contract.

> "The Court instructs the jury that if you believe from the evidence instructions which direct a verdict for a party cannot be given by other instructions. The instructions in question direct is sufficient to say, in answer to this argument, that the giving of inconsistent instructions is ground for reversal, even though one of the contradictory instructions may be correct."

In view of the above and therefore the giving of the instructions complained of, it is unnecessary to consider the other assignments of error. It is sufficient to say that the instructions complained of were erroneous and prejudicial to the rights of the plaintiff in error, and for this reason the judgment of the lower court is reversed and the cause remanded for a new trial.

of the same upon several grounds, the principal one being that Beindorf was dead and that the proposed testimony was prohibited by par. 4, Ch. 51 of the statutes relating to Evidence and Depositions. The defendants now claim that the evidence does not show that Beindorf was dead. When the evidence was offered counsel for the plaintiff stated to the court that Mr. Beindorf was dead. Counsel for the defendants did not dispute that statement of fact but he insisted that the statute did not prohibit such testimony even if Beindorf were dead, and the court, in admitting the testimony, sustained counsel's theory of the law. If it be assumed that the defendants had shown that Beindorf was an agent with sufficient authority to bind the plaintiff by an admission against interest, nevertheless, the admission of the testimony was in violation of the statute. (See Rothstein v. Siegel Cooper & Co., 102 Ill. App. 600; The Standard Brewery v. Sweeney, 185 Ill. App. 430.) The plaintiff also contends, and with merit, that the evidence offered by the defendants showed that Beindorf was a mere salesman for the plaintiff and that such proof was insufficient to show that he had the authority to bind the plaintiff by an admission against interest, and therefore, independently of the statute, the evidence was not competent.

In the view that we have taken of this appeal, we do not deem it necessary to consider a number of other alleged errors assigned by the plaintiff.

It would be a grave miscarriage of justice to permit the present judgment to stand. Accordingly, the judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

35537

35 A

BARBARA PRICE,
Appellee,

v.

O. J. JOHNSON and
ARTHUR V. JOHNSON,
Appellants.

APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

266 I.A. 600[1]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Barbara Price sued O. J. Johnson, Arthur V. Johnson and Walter F. Nolte in case. There was a verdict returned finding the two Johnsons guilty and assessing the plaintiff's damages at the sum of $3,000, and finding the defendant Nolte not guilty. Both Johnsons have appealed from a judgment entered upon the verdict.

The defendant O. J. Johnson filed a plea of the general issue and also one of non operation and control. The defendant Arthur V. Johnson filed a plea of the general issue. No question is raised as to the pleadings.

The theory of the plaintiff was that the defendant Arthur V. Johnson, at the time and place of the accident in question, was using a car belonging to the defendant O. J. Johnson; "that Arthur V. Johnson was the servant of O. J. Johnson, and that at the time of the occurrence in question said defendant, Arthur V. Johnson, was acting within the scope of his authority and in pursuit of his master's business;" that the plaintiff was a passenger in the Johnson car by permission and request of both Johnsons; that while the defendant Arthur V. Johnson was driving north on River road a few hundred feet north of Oakton street his automobile collided with an automobile owned by the defendant Nolte, which the

256 I.A. 600

15837

BARBARA PRICE,
Appellee,

v.

O. J. JOHNSON and
ARTHUR V. JOHNSON,
Appellants.

APPEAL FROM CHEYENNE COUNTY DI
COURT DISTRICT.

MR. JUSTICE MORGAN DELIVERED THE OPINION OF THE COURT.

Barbara Price sued O. J. Johnson, Arthur V. Johnson and Walter Z. Rolfe in case. There was a verdict returned finding the two Johnsons guilty and assessing the plaintiff's damages at the sum of $3,500, and finding the defendants Rolfe not guilty. Both Johnsons have appealed from a judgment entered upon the verdict.

The defendant O. J. Johnson filed a plan of the general issue and also one of non operation and contract. The defendant Arthur V. Johnson filed a plea of the general issue. No question is raised as to the pleadings.

The theory of the plaintiff was that the defendants Arthur V. Johnson, at the time and place of the accident in question, was using a car belonging to the defendant O. J. Johnson; that the time of the occurrence in question said defendant, Arthur V. Johnson, was acting within the scope of his authority and in pursuit of his master's business; that the plaintiff was a passenger in the Johnson car by permission and request of both Johnsons; that while the defendant Arthur V. Johnson was driving north on First

latter was then driving in a southerly direction, and that as a result of the joint negligence of the said Arthur Johnson and Nolte the two automobiles collided and the plaintiff was thereby injured. The theory of the defendant O. J. Johnson was that while he was the owner of the automobile, he was not liable to the plaintiff because he was not driving nor riding in the car at the time and place in question, and the defendant Arthur V. Johnson (his son) was not acting as his servant or agent at the time of the accident but was using the car for his own purposes and pleasure. The theory of the defendant Arthur V. Johnson was that he was not guilty of any negligence that proximately contributed to the accident, and that the collision occurred solely through the negligence of the defendant Nolte.

The defendants contend that "the trial court erred in refusing to direct a verdict for the defendant O. J. Johnson at the close of all the evidence." This contention is a meritorious one. The substance of the plaintiff's testimony is as follows: She had known Arthur V. Johnson for several months and on the night of March 19, 1929, she met him at a gas station at Palmer street and Crawford avenue, Chicago; that she "had a date with Arthur" and she was "under the impression they were going to the movies;" that "he said he would go to the movies;" that she also saw the defendant O. J. Johnson at the station and that the latter said to his son, "Arthur, will you go there for me?" to which Arthur responded, "All right, Dad;" that Arthur then said to her, "Will you go along?" to which she replied, "All right," and that the defendant O. J. Johnson then said, "Sure, go ahead, Barbara," and that she then got in the car. It is admitted by the plaintiff that "the record does not show the nature of the errand which the defendant Arthur Johnson undertook for his father." She further testified that after they had ridden

for his father." The lawyer testified that after they had taken
matters of the estate which the defendant Arthur Johnson successfully
it is admitted by the plaintiff that "she cannot even put when she
said, "sure, go ahead, Darlene," and that she then left in the car.
she replied, "All right," and then the defendant O. J. Johnson then
Dad!" that Arthur then said to her, "Will you go along?" to which
will you be there for me?" to which Arthur responded, "All right,
Johnson at the meeting and that the latter said to his son, "Arthur,
he would do to his mother;" that she then saw the defendant O. J.
"under the impression they were going to the movies." that "he said
evening. Christen that she "had a date with Arthur" and she was
19, 1939, she met him at a gas station on Palmer street and Cleveland
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The substance of the plaintiff's testimony in re Indiana the 2nd
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referring to direct a verdict for the defendant O. J. Johnson at the
Hence that previously construed to the contrary, and that the
collision occurred solely through the negligence of the defendant
Dolfo.

The defendants contend that "the trial court erred in
defendant Arthur T. Johnson and that it was not guilty of any negli-
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question. and the defendant Arthur T. Johnson (his son) was not
he was not driving nor riding in the car at the time and place in
owner of the automobile. He was not liable to the plaintiff because
The theory of the defendant O. J. Johnson was that while he was the
the two automobiles collided and the plaintiff was thereby injured.
result of the joint negligence of the said Arthur Johnson and Dolfo
Dolfo was then driving in a southerly direction, and that as a

a little while Arthur stopped at a gas station and stayed there about five minutes, and then drove to another gas station and stayed there about five minutes; that they then had a discussion as to whether or not they should go to a movie and he said "it was too late * * * 'Let us take a ride,'" and that they then started on a ride. How long this ride lasted is not definitely shown by the proof but it would appear that it must have lasted an hour or two, as the accident did not happen until 11:15 or 11:30 p. m. and they left the first gas station about 9:30 p. m. Plaintiff further testified that after "riding along" they reached River road near Oakton street and headed north; that Arthur then "got fresh * * * took his hands off the wheel and tried to put them around me," and said to her, "Why don't you be sociable?" to which she replied, "Why don't you behave like a gentleman?" that she was "trying to push away from him" at the time the accident occurred. The place of the accident was approximately ten miles from the first gas station.

It is clear from the evidence that if Arthur Johnsen started out on an errand for his father, he had completed it more than an hour before the accident happened, and at the time of the collision was not engaged in doing his father's business but was using the car for his own purposes and pleasure. Under such circumstances there was no liability on the part of the father. (See the recent case of Miller v. McHale, 263 Ill. App. 471, and cases cited therein. See also Andersen v. Byrnes, 344 Ill. 240, 245, and Boijke v. Finley et al., Ill. App. Ct. Gen. No. 35289.) It is the settled rule of this state that a judgment against two defendants is a unit and cannot be reversed as to one and affirmed as to the other (Nordhaus v. Vandalia R. R. Co., 242 Ill. 166; Seymour v. Richardson Fueling Co., 205 Ill. 77), and therefore the judgment as to both defendants must be reversed.

While our conclusion as to the first contention is decisive of this appeal, nevertheless, we feel impelled to refer to one more contention of the defendants, viz., that "the conduct of the attorney for the plaintiff was highly improper and prejudicial throughout the trial." From a careful examination of the record we are satisfied that this contention is clearly a meritorious one. During the examination of the witnesses and also during his closing arguments, the counsel for the plaintiff repeatedly made statements in the hearing of the jury that were highly improper and that were well calculated to prejudice the case of the defendants. We deem it proper to state that this division of the court, also the first division, have been obliged to reverse and remand a number of judgments for improper conduct of the same attorney. If the instant contention were the only one raised we would deem it our plain duty to reverse the judgment.

Other alleged errors assigned by the defendants need not be considered.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner J., concur.

Their one contention as to the first conviction is

derivative of this theory, namely, as they implied to refer

to one more contention of the indictment, viz., that 'the numbers

of the witness for the plaintiff are highly improbable and inconsistent

throughout the trial.' Upon a careful examination of the record we

are satisfied that this contention is clearly a misstatement.

During the examination of the witnesses and also during his closing

argument, the counsel for the plaintiff repeatedly drew attention

in the hearing of the jury that they were highly improbable and that were

well calculated to prejudice the mind of the defendants. In doing

it proper to state that this division of the court, also the first

division, have been obliged to examine and transcribe a number of irre-

marks for improper comments of like sort appeared. If the learned

counsel were the only one judge we would have it no doubt duly

to censure the judgment.

Other alleged errors relied by the appellants need not

be considered.

The judgment of the Superior court of Cook county is

reversed and the cause is remanded.

Mr. Justice [illegible] delivered the opinion.

Brighy, P. J., and Jones J., concur.

35553

LOUIS PINE,
Appellee,

v.

WILLIAM S. KLEINMAN,
Appellant.

WILLIAM S. KLEINMAN,
Appellant,

v.

LOUIS PINE,
Appellee.

36 47

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

266 I.A. 600

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On November 29, 1929, Louis Pine sued William S. Kleinman. In his second amended statement of claim Pine alleges, in substance, that about June, 1927, he hired and retained Kleinman as his attorney in three law matters and that Kleinman agreed not to charge him more than $500 as attorney's fees for services therein; that one of the matters related to the collection of certain indebtedness due to Pine from the Gary Screen Company, of Gary, Indiana, as well as garnishment suits to effect the recovery thereof; that Kleinman collected from various persons, firms and corporations, on account of the said matter, $1,500; that Kleinman also received from Pine $169 for costs and disbursements, and that Kleinman refuses to account to Pine for collections and costs in excess of the $500 agreed for fees and that there is due Pine, after allowing Kleinman the $500, $1,169. In May, 1931, Kleinman caused a judgment by confession to be entered against Pine upon a promissory note for $1,500, signed by Pine and made payable to Kleinman. Kleinman's affidavit of claim alleges that there is due to him from Pine, after allowing

of claim alleges that there is due to him from them, after allowing
claims by them not made by Eleimmon. Eleimmon's affidavit
remains to be entered against them upon a previously made for $7,500,
the 1900, $7,126. In May, 1927, Eleimmon caused a judgment by con-
agreed for them and that there is due them, after allowing Eleimmon
account to them for outstanding and owing in excess of the 1900
fine $100 for costs and disbursements, and that Eleimmon returns to
account of the said motor, $7,500; that Eleimmon also received from
Eleimmon collected from various persons, firms and corporations, on
as well as Eleimmon suits to effect the recovery thereof that
edness due to them from the said motor Company, at Gary, Indiana,
that one of the matters related to the collection of certain indebt-
charge for more than 1900 on Attorney's fees for obtaining judgment
on Eleimmon's affidavit in these the matters and that Eleimmon appear not to
in subsequent, that about June, 1927, he hired one retained Eleimmon
Eleimmon. In his second amended statement of claim they allege,

On November 29, 1928, Lewis Pine cast William C.

[illegible] Appellee.

A.

LEWIS PINE,

WILLIAM C. ELEIMMON, Appellant.

A.

LEWIS PINE, Appellee.

25822

LEWIS PINE,

A.

WILLIAM C. ELEIMMON, Appellant.

APPEAL FROM

SUPERIOR COURT

OF LAKE COUNTY.

256 I.A. 600

the latter all just credits, deductions and set-offs, the sum of $1,500, exclusive of attorney's fees and interest, and that the total of the principal and interest amounts to $1,739.50. Judgment was entered for $1,908.95, which included $169.45 for attorney's fees for entering up the judgment. In June, 1931, upon motion of Pine, he was given leave to appear and defend the suit, the judgment to stand as security. The two causes were, by order of court, consolidated and they were tried before the court with a jury. In Pine v. Kleinman the jury returned a verdict in favor of the plaintiff and assessed his damages at the sum of $270, and in Kleinman v. Pine the jury returned a verdict in favor of the defendant. Kleinman has appealed from the judgments entered upon the verdicts.

It appears that Pine's attorney, Levinson, and Kleinman formerly had been associates. They had had serious differences in the past and as a result of the same had been bitter enemies for a number of years. Pine was aware of this enmity, and the charge is made that he employed Levinson to represent him because of the latter's hostility to Kleinman. A number of grounds are urged in support of the contention that new trials should be awarded, but in the view that we have taken of this case it is necessary to consider only two. Kleinman contends (1) that the verdicts are contrary to the manifest weight of the evidence, and (2) that they were produced by the improper and prejudicial conduct of Pine's attorney, Levinson, during the trial of the cause. There is some force in the contention that the verdicts are manifestly against the weight of the evidence, but if this trial had been conducted in a proper and orderly way we would feel inclined to sustain the verdicts of the jury upon the ground that they had a better opportunity than we to pass upon the credibility of the witnesses and the weight that should be attached to their

testimony. As to the second contention: From the beginning of the trial to the end Attorney Levinson and Kleinman engaged in disputes of a purely personal character. Charges and countercharges of the most serious kind were common. The trial court made repeated efforts to regulate the conduct of these two parties, but without success, and we are at a loss to understand why the court did not sentence Kleinman and Levinson to jail for their highly improper and contemptuous conduct. It is clear that the real issuesin the case were lost sight of because of the conduct of these parties. The court ordered the jury to return only one verdict, but it returned two, and the court, for some reason not shown by the record, received both. Considered together they are not in accord with the theory of fact of either side. As we read the record we are not surprised that the jury was confused. Justice demands that there be a retrial of the two causes. In the oral argument in this court Attorney Levinson exhibited such a feeling of bitterness and hostility towards Kleinman that we suggest that he should, in justice to the latter and to himself, as an officer of the court, take no part in the next trial of the causes.

The judgments of the Municipal court of Chicago are reversed and the two causes are remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

testimony. As to the second question, Does the bringing of the trial to the end interest Lawrence or Clarence engage in disputes of a purely personal character. Counsel and counsel-engage of the most serious kind were common. The trial court knew enough efforts to regulate the conduct of those two parties, but without success, and so are of a kind to manifestly dip the court did not endeavor Clarence and Lawrence to jail for their mutual impropriety and contemptuous conduct. It is clear that the real issue in the case were just right at because of the conduct of these parties. The court charged the jury to return only one verdict, but if returned two, and the court, for some reason not known at the record, received both. Consistent judgment only are not in accord with the liberty of free of either side. As we read the record we are not warranted that the jury was confused. Counsel suggests that there be a capital at the end record. In the only argument in this court to the Justice was to himself, as an officer of the court, rules as possible towards Clarence that he should, in justice testimony testimony and a finding of guilty of the crime. Jury to the jury argument in this court

The judgments of the municipal court of Chicago are

affirmed.

CLARKSON, P. J., and SCANLAN, J., concur.

35689

KRESZENS MANDL,
Plaintiff in Error,

v.

MANFRED LINDNER,
Defendant in Error.

384

ERROR TO SUPERIOR COURT,
COOK COUNTY.

266 I.A. 600[3]

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for injuries sustained by her as a result of being ordered by plaintiff to help him move a heavy piano. There was a jury trial and a verdict for $1200 in plaintiff's favor. Afterward there appears in the record defendant's motion in arrest of judgment, which was sustained and his motion for new trial denied. On motion of plaintiff he was given leave to amend his declaration and various pleadings were thereafter filed, the effect of which was to hold that plaintiff's cause of action, as alleged in her amended declaration, was barred by the statute of limitations. Her suit was dismissed and she prayed and was allowed an appeal. Afterward this writ of error was sued out from this court. The writ was served on the defendant. Afterward his death was suggested of record but no one has been substituted in his stead.

March 25th plaintiff's counsel was advised that unless the substitution was made within fifteen days, the writ of error would be dismissed. Nothing further has been heard from him and nothing has been done in the case.

For failure to have the substitution made the writ of error is dismissed.

DISMISSED.

McSurely and Matchett, JJ., concur.

Defendant.

Plaintiff in error,

vs.

No. 3666

Defendant in error.

Plaintiff in error cautioned by her as a result of being
induced by plaintiff to help him move a heavy piano. Upon his
failure and refusal to pay her for her services, plaintiff
then tried and obtained the $1500 in plaintiff's favor. Plaintiff
there objects in the second defendant's motion to direct a judg-
ment, which was overruled and his motion for new trial denied. On
motion of plaintiff he was given leave to amend his declaration and
action pleading here specifically that the actions of which she
had just plaintiff's cause of action, as alleged in her amended
declaration, was barred by the statute of limitations. But this was
dismissed and the burden was placed on plaintiff. Plaintiff
cited on its behalf that she did not file suit within one year
after it cause was said but then this court.

Mrs. Plaintiff's counsel are relying upon the
case of Plaintiff to help him move a heavy piano. Upon his
failure and refusal to pay her for her services, plaintiff
then tried and obtained the $1500 in plaintiff's favor. Plaintiff
there objects in the second defendant's motion to direct a judg-
ment, which was overruled and his motion for new trial denied. On
motion of plaintiff he was given leave to amend his declaration and
action pleading here specifically that the actions of which she
had just plaintiff's cause of action, as alleged in her amended
declaration, was barred by the statute of limitations. But this was
dismissed and the burden was placed on plaintiff. Plaintiff
cited on its behalf that she did not file suit within one year
after it cause was said but then this court.

Mrs. Plaintiff's counsel are relying upon the
case of Plaintiff

Defendant in error.

vs.

Plaintiff in error,

No. 3666

35758

PETER PETERSEN,
Appellee,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation, and THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

266 I.A. 600

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit under the Employers' Liability act against the defendants to recover damages claimed to have been sustained by him on account of the defendants' negligence. There was a verdict in plaintiff's favor for $10,000, a remittitur by him of $3,000, and judgment entered on the verdict for $7,000. Defendants appeal.

The record discloses that about eight o'clock on the evening of March 14, 1927, plaintiff while engaged in his duties as crossing flagman at the Clinton street crossing of defendants' railroad tracks in Chicago, was struck by a westbound locomotive and injured.

The evidence is to the effect that plaintiff, about 45 years of age, was employed by the defendant Pennsylvania Railroad Company, and had been working for that company and the other defendant (he being paid by both defendants for his services) for about eleven months prior to the time he was injured. During that time he worked as a flagman and as a tower man at street crossings for the defendants along its railroad tracks from Clinton street on the east to Ann street on the west, a distance of about a mile. The defendants operated two main tracks from the Union station on Adams street, an east and west street. The tracks run in a northerly direction along the west bank of the Chicago river a distance of about two blocks, to Lake street, an east and west street,

25758

PETER SHERMAN,

Appellee,

vs.

CHICAGO, BURLINGTON, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation, and THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,

Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Filed

No. 25758 I.A. 600

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit under the Employers' Liability Act against the defendants to recover damages claimed to have been sustained by him on account of the defendants' negligence. There was a verdict in plaintiff's favor for $15,000, a remittitur of $5,000 was entered on the verdict for $10,000. Defendants appeal.

The record discloses that about 11:30 o'clock on the evening of March 11, 1927, plaintiff was employed in his duties as wrecking foreman at the Clinton street crossing of defendants' railroad tracks in Chicago, and was struck by a westbound locomotive and injured.

The evidence is to the effect that plaintiff, after having been relieved by the defendants' physicians notified the Chicago, Rock Island & Pacific Railroad Company that he was injured. During that time he worked as a flagman and at other occasional jobs for the defendants around the railroad tracks (the nature of which is not shown by the abstract). For a short time prior to the injury he had been employed as a wrecking foreman, in charge of about ten laborers, in clearing away a pile-driver which had fallen along the west bank of the Chicago river a little north of Polk street, on said west street, on the north end of the bridge. The bridge ran in a northerly direction along the west bank of the Chicago river a little north of Polk street, on said west street,

then turn northwesterly for a short distance, and curve rather sharply to the west about two blocks north of Lake street and cross Clinton street, a north and south street. Jefferson street is a north and south street; a short block west of Clinton street about half a mile farther west and just south of the two tracks was a water tank where locomotives often took on water. At the Clinton street crossing the two main tracks were about 12½ feet from center to center. Crossing gates at Clinton street were operated by a man in a tower at the northeast corner of the crossing. The distance from the center of the westbound track to the north gate was 16½ feet; the south gate was 48 feet from the centeron the eastbound or southerly track, so that the distance between the two gates was 77 feet. At the northeast corner of the intersection was a switchman's shanty used by the plaintiff and other crossing flagmen.

On the day in question plaintiff went to work at three o'clock in the afternoon and was to work until eleven o'clock that night. He was injured about eight o'clock while he was engaged in flagging. The usual and customary way of operating the trains was that inbound trains would come into the Union station over the south track and leave over the north track.

The evidence further shows that just prior to the accident an electric bell rang in the tower at the northeast corner of the crossing to warn of the approach of a train on the outbound track; the tower man also rang a crossing bell which he operated by means of a rope. Plaintiff was at his shanty at the northwest corner of the intersection and when he heard the bell ring got his lantern and went out on the crossing to the south of the inbound track to flag. As he walked out the crossing gates were lowered. He looked to the east and saw the headlight of the engine coming around the curve about 100 feet from him, but he could not tell on which track it was on account of the curve. He stepped over to the

south of the inbound track and looked west to see if anything was coming from that direction; nothing was coming and he then turned and looked east and at that time the engine was about 3 or 4 feet away coming out on the south or inbound track. He was about a foot south of the track but was struck by the engine and injured. The engine was running about 10 or 15 miles an hour with the automatic bell ringing.

The theory of the plaintiff was and is that the defendants were guilty of negligence in running the engine out on the wrong track without notice or warning to him.

The position of defendants is that there was no negligence on their part, but that the sole and proximate cause of plaintiff's injury was the negligence of plaintiff himself, and therefore the court should have directed a verdict for the defendants at the close of all the evidence, as requested.

The inquiry therefore is, whether under all the evidence, viewed most favorably to plaintiff, there was any failure of the defendants to perform any duty they owed him. Upon a motion to direct a verdict for the defendants the court cannot weigh the evidence, but the motion should be allowed only "where the evidence, with all the legitimate and natural inferences to be drawn therefrom, is wholly insufficient, if credited, to sustain a verdict for the plaintiff." Libby, McNeill & Libby v. Cook, 222 Ill. 206; Sierzchula v. Chicago & Alton R. R. Co., 209 Ill. App. 15.

Plaintiff testified that he was employed by the Pennsylvania company and had been working for it for about 11 months as a flagman at street crossings and as a tower man, from Ann street on the west to Clinton street on the east; that at the Clinton street crossing in addition to the two main tracks which we have above described, there were 3, 4 or 5 tracks south of the inbound main track and one north or outbound main track; that the tracks at Clinton street are

on a level with the roadway of the street; that a watchman in the tower at the northeast corner of the crossing operates the crossing gates which extend across the street north and south of the tracks; that plaintiff was injured about 7:45 o'clock at night and that it was "a kind of a dark, cloudy night;" that he started to work at 3 o'clock in the afternoon and his shift ran until 11 o'clock; that there were cars standing east of Clinton street on the tracks south of the inbound track which cut off plaintiff's view of the outbound engine until just about the time it was turning west; that when he started to work the foreman showed him how to flag; that if there was an outbound train he should stand south of the inbound track, and if there was an inbound train he should stand north of the outbound track; that he had never done any railroading until he worked for defendants; that the first job he had was handling the gates when he worked in the tower at Ann street, and that he did not work regularly but was a sort of extra man; that he flagged at Jefferson street about five months, every day; this street is one block west of Clinton street; that after he worked at Jefferson street he was on an extra list back and forth through the yard; that he worked at the Clinton street tower a few days at different times; that he went to flag at Clinton street on the day he was injured but had never flagged at that crossing on the shift from 3 to 11 p. m.; that when he worked at Clinton street he observed what tracks the trains went in and came out on; that they always went into the station on the inbound track and came out on the outbound track; that he never noticed any train coming out on the inbound track; that the traffic was fairly heavy over the two tracks at the crossing all day long; that he knew when trains were coming out from the station because an electric bell would ring in the tower to give a warning, and that when the bell rings the tower man pulls a cord and rings a big crossing bell; that when he heard the electric bell he got his

lantern and went out on the crossing; that that bell never rings for an inbound train, only for an outbound train; that when he got out on the crossing he looked east and saw an engine pulling around the curve about 100 feet away; that he could not tell whether it was on the inbound or outbound track; that he stepped over the inbound track and looked west to see if there was anything coming on the inbound track; that he didn't see anything in that direction, then turned his head to the east again and the engine struck him. The engine was coming out on the inbound track but he didn't hear the bell on the engine ringing nor any whistle; he was about a foot south of the inbound track.

On cross-examination he testified that he flagged at the Jefferson street crossing about 5 months; that after that he worked at different crossings sometimes two or three times a week, and sometimes all week; that he worked practically on all shifts; that he had worked in the Clinton street tower; that "I have also worked on the ground at Clinton street, I don't remember how many times; that would probably be a different shift from the shift I got hit. I might work in the morning - whichever shift the man happened to be off and they happened to call me in to fill in;" that "I had been working at Clinton street and I also worked at Jefferson and some of those other streets there. I worked on all those crossings off and on;" that during the previous summer when he worked on all the different shifts, "I never saw a train operated on the wrong track on the main line, not that I noticed.*** I never saw it done on the main track on my shift."

John Manlon, an assistant train director of the Pennsylvania railroad, testified for the defendants that he was stationed at the Lake street tower and was a train director and had been there for six years; his duties were to direct traffic so as to avoid congestion; that his tower was two blocks north of the train

vasti confusion; that his power was the strange power of the train there for six years; his duties were to direct traffic so as to be at the free street number and a train director and they been his relief," meant for the below decks that he was occupied in fact, an assistant train dispatcher of the Pennsylvania Railroad" and some of those other streets there. I began on all there crowded up and on;" that dating the previous summer when that it was "Everett Phillips." "I never saw a train dispatched on the main line, but that I no load.... I know how it done on the main track on my shift."

Jack Bailey, an assistant train dispatcher at 30th Street Station, Philadelphia, had been employed by the railroad for 10C days, just be ready not just whether it was an inbound or outbound train; that he climbed over the inbound train and looked back to see if there was anything coming on the inbound track; that he didn't see anything in that direction. Then engine was coupled out to the inbound track but he didn't want the engine uncoupled until he was sure the rear engine was on the main track; he was about a foot

shed of the Union station and two blocks south of Clinton street; that only two tracks run past the tower; that he was instructed to divert trains on either of the main lines to avoid congestion or delay; that it does not make any difference what track trains go over; that if everything is normal it will go out on the outbound track and come in on the inbound track; that the train in question was a suburban train and came into the station on the inbound track about 7:45 p. m.; that the engine was then disconnected and was going out to take in water preparatory to coming back and taking out a train from the Union station about 9:15 o'clock; that usually when the engine of this train was going out for water it would go out on the wrong or inbound track; that this would happen about five or six nights a week, sometimes 6 or 7; that most of the time it came out on the inbound track because that was the easiest way to get to the water tank, because there would be only about four switches to turn instead of five or six if it went out on the outbound track. "As long as I have been there I have been allowing that train to come out on the wrong track. At any second you might have to send a train on the wrong track. *** Ordinarily I would say, we run trains out on that track several times a week, -- other trains besides this one*** We have allowed this ever since I have been in the tower;" that there were about 35 or 36 engines coming out of the Union station a day over the two main lines while he was on duty; that all of the trains coming out from the station crossed Clinton street; that the tracks are fairly busy there; that ever since he had been at Lake street tower he had worked the same shift; that other engines were in the habit of going out on the inbound track the same as the engine did which struck Petersen; that during his shift every day there were four or five trains out of 35 that went out on the inbound track; that he would send them out on that track even when the tracks were not obstructed because it was

quicker and shorter to do so; that at that time there was no block system in use; that they then depended on switch tenders and telephone calls; that his superiors knew that he ran trains out on the inbound track; that the engine which struck plaintiff was the only passenger locomotive that would go back to get water; that it had done so every evening since he had been there.

Ed Guith, the Clinton street tower man, called by the defendants, testified that he had been at that tower for about two years on the shift from three to eleven o'clock at night; that his duties were to operate the crossing gates and to give warning by ringing a bell when a train was coming out from the station; that at the time in question the electric bell in his tower rang to give warning of the approach of the outcoming train; that he then rang his bell for Petersen to flag the crossing; that Petersen came out and went on the south side of the inbound track; that there was a headlight on the engine; that he saw the accident and thought plaintiff was stooping over and he clanged his bell and then saw plaintiff knocked down by the engine; that he had seen engines approaching on the wrong track many times and that the engine in question had always gone out on the inbound track; that it would do this from five to six times a week since 1926; that he had seen other engines come out on the same track - passenger and switch engines, eight or ten times a week; that "I couldn't say whether they are supposed to run the inbound trains over the outbound tracks;" that usually trains come in on the inbound track and go out on the outbound track; that about 45 or 50 trains come out of the Union station every day on his shift and about three or four times a day they come out over the inbound track; that you could not tell from the bell whether the train was coming out over the inbound or outbound track; that he could not see the train in question because of box cars standing on the tracks south of the inbound track, until it came

standing on the inside rough of the inbound track, until it came that he could see whether the train in question consisted of more cars than the usual ten; that Ben could not tell from the sound whether the train was coming out over the inbound or outbound track; that on the night of the accident there had been only one train every day on the milk mail about three or four times a day they came train; that about 12 or 20 trains came out of the Union station train came in on the inbound track and go out on the outbound track from the inbound track over the outbound tracks;" that normally two times a week; that I couldn't say whether they are scheduled to come out on the same track - westbound and eastbound trains, eight or five to six times a week since 1932; that he had been other engines had stands time out on the inbound track; that it would be this time log on the stand track only times but that the engine in question still remained there by the engine; that he had seen engines collapsed still was standing over and be standing his bell and been one platform headlight on the engine; that he saw the assistant and fireman was and went on the south side of the inbound track; that there was a red light for Patterson to flag the crossing; that Patterson came out his bell for Patterson at the switching stand; that he then rang warning of the approach at the switching stand; that he then rang at the time in question the electric bell in the tower rang to give ringing a bell when a train was coming out from the station; that duties were to operate the crossing gates and to give warning by means on the milk line there is eleven o'clock at night; that his testified that he had been at that tower for about two months, the Clinton street tower and, acting by the de-

Mr Smith, the Clinton street tower man, acting by the department instructions that would do back it for work; that at that time he was doing everything alone in that tower.

around the curve; that there was no way plaintiff could tell on which track the train was coming out; that after he rang his bell to give notice to plaintiff to flag the crossing, the engine came out, that "it was the usual movement;" that he had never seen Petersen on the Clinton street crossing before; that he had RXXXX been flagging at Jefferson street, he was a night man; that on the evening in question plaintiff was an extra man; that it was the only time he knew of Petersen working at the Clinton street crossing.

Fitzgerald, the fireman of the engine in question, testified that on the evening in question he came in on the train from Deerfield to the Union station, Chicago, and arrived about 7:45 and there waited for a signal to go out from the station to take on water; that as the engine went out it was headed west; that it was a regular occurrence to take water that way and customary to go out on the inbound track; that "As many times as I have been on the job, the engine was taken out on the inbound track;" that this occurred several times a week. They were travelling about 15 miles an hour as they came to Clinton street; the headlight of the train was burning and the bell ringing automatically; that he saw plaintiff was about to be struck and "hollered to the engineer" to apply the emergency brake; that he saw plaintiff strike a match and light his pipe at the time; that he was standing "right on the rail;" that the engine stopped and they picked Petersen up; that almost all the time he was on that particular run "we brought our engine out for water over the inbound track;" that the engine headed west; that they seldom if ever went out over the outbound track to get water-- "We never went out any other way that I can remember;" that there were no cars attached to the engine at the time.

Higginson, the engineer of the locomotive in question, testified that he had been an engineer since 1905; that he brought the train into the station about 7:55 from Deerfield; that they then

started back to get water, which they did every night; that after they got water they came back to the station to take out another train; that it was about an hour and fifteen minutes from the time they arrived until they left with another train; that at the time in question the headlight was burning and the automatic bell ringing; that they went out on the inbound track and as they neared Clinton street his fireman called to him to stop the engine, that they were about to strike a man; that he applied the emergency brake and stopped; that when they came out of the station they were on the inbound track; that this was a regular movement and averaged about six or seven times a week while he was running that train, which he had been doing for about three months; that during that period he always took his engine out for water on the inbound track six or seven times a week.

Johnson, who at the time was a trainmaster supervising trains, in order to facilitate movements, was located at the Union station, and testified that he recalled the passenger train in question which came into the station on the evening in question about 7:55 p. m.; that the engine was there detached and was going out to take on water; there was an advantage in sending it out over the inbound track because it could be done more quickly and more easily; that there were about two switches to throw if they went out over the inbound track for water, while if they went out over the outbound track, it would be necessary to throw about six switches; that going out to get water over the inbound track was a regular movement made from six to seven nights a week; the train in question was a daily train; that "That movement was made every night;" that there were records in the Lake street tower which showed the movement of all trains from the Union station.

In rebuttal plaintiff denied that he was lighting his pipe at the time of the accident and that he did not smoke at that

time.

This is the substance of all the evidence as to the railroad experience of plaintiff, the location of the tracks, the movement of the trains, and as to how the accident occurred.

In a case of this kind the question of negligence is generally one of fact for the jury, but when all reasonable minds would reach the conclusion that there was no negligence on the part of the defendants, then the question is one of law for the court. Louthan v. Chicago City Ry. Co., 198 Ill. App. 329. The question then arises, whether the defendants were guilty of any negligence which proximately contributed to plaintiff's injury -- Did the defendants breach any duty they owed plaintiff? Viewing the evidence in the light most favorable to the plaintiff, we are of the opinion that the question must be answered in the negative. The evidence shows that the defendants, in operating the engine (which struck plaintiff) west on the inbound track were not making an unusual movement but a customary movement, and although plaintiff testified in effect that he did not know that outbound trains or locomotives came out from the station on the inbound track, but apparently thought that they were coming out on the north or westbound track, this only shows that he was mistaken; that he did not know the custom at this crossing. He had been working as a crossing flagman for the defendants in the near vicinity for eleven months, and for five months had been so employed at Jefferson street - one short block west of Clinton street, where the accident occurred. And the movements of the trains at Jefferson street over the wrong track - outbound engines traveling on the south or inbound track - was the same as at Clinton street, because the water tank where the engines went to take on water was located some distance from Jefferson street.

Under these circumstances we are of the opinion that the

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time.

defendants owed no duty to the plaintiff to inform him of the custom of operating engines westbound on the south or inbound track. Nardoni v. C. & E. I. Ry. Co., 261 Ill. App. 339; Winfree v. Seaboard Air Line Ry. Co., 199 N. Car., 590; Chesapeake and Ohio Ry. Co. v. Mihas, 280 U. S. 102; Dewald v. Hines, 280 Pa. 169; Director General of Railroads v. Hubbard's Admr., 132 Va. 193; Hillifield's Adm'x v. L. & N. R. Co., 16 S. W. (2nd) 472; C. & O. R. R. Co. v. Nixon, Admx., 271 U. S. 218; Morgan v. Northern Pac. Ry. Co., (C.C.A.) 196 Fed. 449.

In the Nardoni case (261 Ill. App. 339), it was held that it was not negligence for a railroad company to operate a northbound train over a southbound track, and the same rule was announced in the Winfree case (199 N. Carolina, 590), where the court said (p. 592): "The northbound train customarily used the east or northbound track, but on this occasion it ran on the west or southbound track" because certain construction work made it necessary, and "A person standing on either track near the place of the accident and facing the glare of the headlight on an engine coming from the south could not definitely determine the track the train was on. But 'there was room to get entirely off the tracks on the south side.'"

And in the Dewald case (280 Pa. 169) the Supreme court of Pennsylvania held that a flagman on a coal train who went back to protect the rear of his train against southbound movements to permit a passenger train to pass, and in doing so ran the passenger train on the northbound track, injuring plaintiff, it was held there was no negligence on the part of the railroad, and that the plaintiff assumed the risk. The court there said (p. 173): "A company is not negligent because it does not notify employees of its purpose to operate trains against traffic around a blockade."

its purpose to operate trains against traffic already a blocked." company is not negligent because it does not notify employees of plaintiff assumed the risk. The court there said (p. 123): "A there was no negligence on the part of the railroad, and that the train on the motionless track, inducing plaintiff, it was held mit a passenger train to pass, and in doing so run the passenger protect the rear of his train against automobiles which fail to Pennsylvania held that a flagman on a local train who went back to

And in the Jewell case (280 Va. 109) the supreme court of on the south side."

train was on. But 'there was room to get entirely off the tracks meeting from the south, could not definitely determine the track the of the accident and facing the place at the headlight as he sighted necessary, and "a person standing on either track near the place or southbound track," because certain eyewitnesses were made it east or northbound track, let an hole occasion it can on the west court said (p. 283): "The northbound train undoubtedly used the mentioned in the Jenkins case (108 S. Carolina, 280), where the pound train over a restricted track, and the case fully was unit was not negligence for a railroad company to operate a north-

In the Burton case (201 Ill. App. 324), it was held that

And in the Hubbard case (132 Va. 193) it was held that no recovery could be had for an employee of a railroad who was killed while he was proceeding west on his motor car on the westbound track by a westbound train operating on the eastbound track. The court held that the failure of the railroad company to notify the deceased of the change of tracks was not negligence which rendered the company liable for his death, although the train which struck him was operated against traffic.

To support the judgment in the instant case counsel for plaintiff cite Erie Railroad Co. v. Purucker, Adm., 244 U. S. 320; C. & O. R. R. Co. v. Proffitt, 241 U. S. 462; L. & N. R. R. Co. v. Parker, 138 So. 231; Smith v. Del. & Hud. Co., 237 N.Y.S. 297; So. Ry. Co. v. McGuin, 240 Fed. 649; Oregon Short Line R. Co. v. Gubler, 9 Fed. (2nd) 494; Pecos & N. T. Ry. Co. v. Suitor, 218 S. W., 1034; L. & N. R. R. Co. v. Asher, 198 S. W. 548; and Penn. Co. v. Stalker, 119 N. E. 163.

In the Purucker case (244 U. S. 320) a section man walking east on the eastbound track stepped over into the westbound track to permit an eastbound passenger train to pass, when he was struck by an engine running backward going east on the westbound track. The Court of Appeals treated the case as one controlled by the state law and held that the Employers' Liability act did not apply. The case turned on the question of instructions submitted or refused by the trial Judge. The court held that the instructions were properly refused and affirmed the judgment, stating that one of the instructions omitted the essential element of the assumption of risk by the section man; that it failed to call attention to the circumstances under which (the testimony tended to show) plaintiff was using the tracks at the time; that it failed to take into account the undisputed testimony that the engine which struck the section man was running without signal or warning to him. We think

In the Pennsylvania case (364 U. S. 340) a switchman was waiting
to permit an approaching freight train to pass, when he was struck
and run over by unattended freight cars set on the westbound track
by an employee tossing switch keys to the yardmaster. The
Court of Appeals treated the case as one controlled by the
state law and held that the employee's liability was its not usual.
We cannot say that the employee, although the train which struck
him was operated negligently, although the train which struck
the accused lights for its track, although the train which struck
decreased of the change of tracks not only negligence which caused
exact path that the liability of the railroad company to notify the
track by a switchman running on the westbound track. The
while he was proceeding west on his motor car on the westbound
railroad could be held for an employee who was killed
by the Pennsylvania case (364 U. S. 340) it can hold that no

it clear that this case is not in point.

In the Proffitt case (241 U. S. 462) a brakeman brought suit under the Federal Employers' Liability act, to recover damages for injuries sustained by him. He was employed by the railroad company as a brakeman and during the night he was called on duty at Gladstone, Virginia, to take his place as head brakeman of a fast freight train, and while he was coupling some cars, which he was ordered to do by the yardmaster, a yard crew, also under orders of the yardmaster, who was switching cars, caused them to collide with the cars plaintiff was in the act of coupling, whereby he was injured. A judgment in his favor was affirmed by the Supreme court and it was said that an employee assumed the risk of injury normally incident to the operation of a railroad, but that he did not assume unusual dangers unless he had been warned of them.

In the Parker case (138 So. 231) a section man was engaged in fastening a plate on the track; a northbound train was operating on the southbound track on the same schedule as if it were on the northbound track; the men in charge of the train were told that Parker was out repairing the track but in spite of this fact the train struck and killed him. The court said (p. 242) "that the train which killed intestate was an extra northbound train traveling on the southbound track, and running on the same schedule as a northbound train then due on said northbound track;" that the deceased "was under the impression said train was said northbound train, and was approaching on said northbound track, and had no specific knowledge to the contrary;" that no signal was given him of the approaching train; that the engineer of the train was told of the deceased's presence when the train was about a half mile from him, "while intestate was on said track in a stooping position, in the act of tightening one of said bolts at the moment

it clear that this case is not in point.

In the Pacific case (181 U. S. 181) a fireman brought suit under the Federal Employers' Liability Act, to recover damages for injuries received by him. He was employed by the railroad company as a fireman and during the night he was called on duty at Glendale, Virginia, in case his aid was needed because of a fast freight train, and while he was awaiting some word, which he was expected to do by the performance, a fast car, also under orders of the Pacific, he was notified there, because there is nothing what the exact physical was in the object of escaping, whereby he was injured. A judgment in his favor was affirmed by the Supreme Court and it was held that a employee because the risk of injury normally incident to the operation of a railroad, but that he did not assume unusual dangers unless he had been warned of them.

In the Taylor case (173 Va. 321) a motion was sustained in favoring a jury at the trial; a switching train was operating on the main southbound track on the same schedule as it was on that morning; the law in force at the train were told that the train and the train was about to pass. While instructed was on said track to a standstill position, in the act of sidetracking one of said cars at the moment of the accident, the engineer of the train was about a half mile from him, which the engineer of the train was about to pass the switch at the instant's distance when the train was about a half mile from him, which the engineer of the train was about to pass the switch at the instant's distance when the train was about a half

the train struck him." The court said it was argued that if the fireman was on the lookout he would have seen Parker and known of his danger; that if the fireman was not on the lookout the train was running blindly on the wrong track "on the same schedule as a northbound train on the northbound track, without any signals of approach, and with the warning that there was danger ahead in the presence of a human being upon that track." And it was held that the railroad was negligent and liable. We think it obvious that the facts in that case are entirely dissimilar to the facts in the case at bar.

In the Smith case (237 N. Y. S. 297) plaintiff a flagman on a train was directed by the conductor to go back and protect the rear end of the train, and while he was back flagging, his train pulled in on a switch to clear for a passenger train which came north on a southbound track. Plaintiff knew that he left his train standing on the southbound track and therefore did not think that a northbound train would use that track. A directed verdict for the defendant was reversed on appeal. The court said (p. 299): "All these circumstances may, as a question of fact, indicate a neglect of duty in failing to exercise due care and to give some notice or warning to one unaware of an impending danger. *** The railroad has the right to run its trains against traffic if it suits its convenience or other purposes.*** But, where workmen or others are in a known position of danger, they may be entitled to reasonable warning of a movement of trains to some extent unusual and unexpected. *** The night was dark, cold and windy. It appears that, during his four months' service Smith had not known of such an unusual movement of this train." The facts in that case are entirely different from the facts in the case before us. Here, as we have held, the movement of the train that struck plaintiff was not an unusual one but a customary movement

struck plaintiff was not an unusual one but a customary movement before us. Here, as we have held, the movement of the train that case and entirely different from the facts in the case before us. Here, during his four months' service with that road of such an unusual movement of this train." The rights was dark, cold and windy. It appears that, during his four months' service with the

that took place many times a week nearly every day.

In the McGuin case (240 Fed. 649) plaintiff was engaged in track walking assisting a surveyor, and while walking along the southbound track was struck by a train running north on that track. The train was running against traffic owing to a broken rail in the northbound track and was traveling from 35 to 40 miles an hour. The engineer and fireman saw McGuin a considerable distance before the accident happened and so had time to warn him of the approach of the train. The court said (p. 651): "Running a northbound train on the southbound track is not evidence of negligence, and all the employees of the railroad must take notice of the occasional necessity to make the change. Nevertheless, as that is not the usual method of running, the railroad company must take notice that their employees will naturally be somewhat less on guard against a northbound train running on a southbound track, and due care requires greater precautions." The court there further said that the engineer "running a northbound train around a curve on a southbound track, saw McGuin on or very near the southbound track and gave him no signal till it was too late." And it was held this was actionable negligence. It is equally clear that the facts in that case are greatly dissimilar to the facts in the case at bar.

In the Gubler case (9 Fed. (2nd) 494, plaintiff was employed by the railroad company in installing a switch connecting the two main tracks and was struck by a car coming west on the eastbound track at a high rate of speed "without lookout, all in violation of the rules of operation of the railway company."

In the Suitor case (218 S. W. 1034) it appeared that Suitor, a crossing flagman, was run over by an engine. The question of the operation of a train against traffic was not involved. The court said that the fireman on the train that struck Suitor saw him in time to have warned him of the approaching engine, "and at such

that took place only three a week nearly every day.

In the Pilgrim case (140 Fed. 658) liability was imposed in track relaying against a motorman, and a train running along the southbound track was struck by a train running north on that track. The train was running against traffic owing to a broken rail in the southbound track and was traveling at the rate of 45 miles an hour. The engineer and fireman saw broken a considerable distance before the accident happened and so had time to warn him of the approach of the train. The court said (p. 661): "Running a northbound train on the southbound track is not evidence of negligence, and all the decisions of the railroad must take notice of the necessary necessity to make the change. Nevertheless, as that is not the usual method of running, the railroad company must have notice that their employes will naturally be accustomed to see and expect a northbound train running on a southbound track, and owe some reciprocal vigilant precautions." The court there further said that the engineer "running a northbound train around a curve on a southbound track, not seeing or very near the southbound track and have his signal till it was too late." And it was held that there was sufficient evidence of negligence. It is equally clear that the facts in this case are exactly identical in the facts in the case at bar.

In the Pfeifer case (4 Fed. (2nd) 464, plaintiff was employed by the railroad company in installing a switch connecting the two main tracks and was struck by a car moving west on the eastbound track at a high rate of speed "without lookout, all in violation of the rules of operation of the railway company."

In the Pelton case (212 U. S. 1034) it appeared that Butler, a crossing flagman, was run over by an engine. The question of the operation of a train against traffic was not involved. The court held that the liability of the train that struck Butler was like in time to have warned him of his approach, "and at such

distance that a warning then sounded would have enabled Suiter to have avoided the collision," and the railroad company was held liable, - that it was the duty of the company to exercise ordinary care to avoid striking him.

In the Asher case (198 S.W. 548) it appears that Asher, a section man, was struck and killed by a southbound passenger train running on time on the northbound track. The court said (p. 551): "When a gang of section men *** are engaged in a special line of work at a particular place, and the railroad company has notice that this crew of men are engaged at work at this place, it is under a duty, if it changes its trains from one of its tracks to the other, to either give notice to the foreman of the crew of men *** or to notify the engineers, who are ordered to leave the track which they habitually use and take the other track, of the place where the crew of men are working and direct them to reduce the speed of their trains at this place and proceed with caution." The court there further said (p. 551): "Here this crew of men were engaged in a special work and at a place where we may well assume this company knew on this day, and before Asher was killed, that they would be at work, because it had given notice to its engineer to take the northbound track. It also knew it had a double track at this place and that its southbound trains habitually used one track and its northbound trains habitually used the other. In addition to this, the section men engaged in this work were not charged with any special duty to look out for trains, and especially were they not charged with the duty of looking out for southbound trains on the northbound track, as the southbound track was not closed to traffic. Neither were they in any immediate danger from southbound trains, because the foreman had sent a flagman out to flag this train, showing that he anticipated that it would run on the southbound track." It was held that the railroad company was negligent.

distance that a waiting train ordered could have notified Butler to have avoided the collision," and the railroad company was held liable, - that it was the duty of the company to exercise ordinary care to avoid striking him.

In the Kenney case (122 U.S. 116) it appears that Kenney, a section man, was struck and killed by a southbound passenger train running on time on the main track. The court said (p. 120): "Upon a gang of section men who are employed in a special line of work at a particular place, and the railroad company has notice that this crew of men are engaged at work at this place, it is under a duty, if it designs its trains from one of its tracks to the other, to either give notice to the foreman of the crew of men or to notify the engineer, who are ordered to leave the track while they pass, to use the other track, of the place where the crew of men are working and direct them to reduce the speed of their trains at this place and proceed with caution." The court there further said (p. 121): "Here this crew of men were engaged in a special work and at a place where we may well assume this company knew on this day, and before Kenney was killed, that they would be at work, because it had given notice to its engineer to take the northbound track. It also knew it had a double track at this place and that its southbound trains habitually used one track and its northbound trains habitually used the other. In addition to this, the section men engaged in this work were not charged with any special duty to look out for trains, and especially were they not charged with the duty of looking out for southbound trains on the northbound track, as the southbound track was not closed to traffic. Neither were they in any immediate danger from southbound trains, because the foreman had sent a lineman out to find this train, showing that he anticipated that it would run on the southbound track." It was held that the railroad company was negligent.

Here it is obvious, the facts are entirely different from those in the case at bar.

.In the Stalker case (119 N.W. 163) a section foreman was injured by a passenger train running west on the eastbound track, contrary to custom. The court said: "The train was run blindly on an uncustomary track in the center part of the city and at a high and dangerous speed."

We think the facts in the cases cited by counsel for plaintiff, some of which we have above discussed, are so different from the facts in the case before us as not to be persuasive. Here, the movement of the engine that struck and injured plaintiff was a customary movement. Here plaintiff had been employed as a flagman and a towerman for practically eleven months, working in the vicinity of the Clinton street crossing. His work was known to him to be somewhat dangerous, and we think it must be held under the law that he assumed the risk. C. & O. Ry. Co. v. Nixon, 271 U. S. 218; D. L. & W. Ry. Co. v. Koske, 279 U. S. 7.

Whatever right plaintiff may have to recover damages for the injuries sustained, it is not under the Federal Employers' Liability act. We hold that the court should have directed a verdict in favor of defendants at the close of all the evidence, and therefore the judgment of the Circuit court of Cook county must be reversed with a finding of facts. Mirich v. Forschner Contracting Co., 312 Ill. 343.

JUDGMENT REVERSED WITH A FINDING OF FACTS.

McSurely and Matchett, JJ., concur.

[illegible] is obvious, the cases are entirely different from those in the case at bar.

In the Gardner case (110 C.C.A. 103) a section foreman was injured by a passenger train running west on the eastbound track, contrary to custom. The court said: "The train was running slightly on an unaccustomed track in the proper part of the city and at a high and dangerous speed."

We think the facts in the cases cited by counsel for plaintiff, some of which we have above discussed, are so different from the facts in the case before us as not to be persuasive. Here, the movement of the engine that struck and injured plaintiff was a customary movement. Here plaintiff had been employed as a flagman and a lookout for practically eleven months, working in the vicinity of the Clinton street crossing. His work was known to him to be somewhat dangerous, and we think it must be said under the law that he assumed the risk. C. & O. Ry. Co. v. Nixon, 172 U. S. 519; [illegible]. Ry. Co. v. Leslie, 179 U. S. 7.

Whatever right plaintiff may have to recover damages for the injuries sustained, it is not under the Federal Employers' Liability Act. To hold that the court should have directed a verdict in favor of defendants at the close of all the evidence, and therefore the judgment of the District Court of that county must be reversed with a finding of fact. Gilpin v. Pere Marquette Railway Co., 119 Ill. 349.

REVERSED EXPRESSED WITH A FINDING OF FACTS.

Heretofore was entered, Mr., counsel.

35758 FINDING OF FACTS.

We find as a fact that the defendants were not guilty of negligence in the operation of the engine in question, as charged in the declaration. And we further find that plaintiff assumed the risk under the facts as disclosed by the evidence.

35779

PHILIP LOMM,
Appellee,

vs.

RUBIN E. RAPPEPORT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

40

266 I.A. 600

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

On February 5, 1931, plaintiff brought suit against the defendant to recover a claimed balance of $43.73 due him for goods sold and delivered. There was a trial by the court without a jury and a finding and judgment in plaintiff's favor for $30, and the defendant appeals.

Plaintiff's claim was that on or about October 6, 1931, he sold the defendant one drum of lacquer containing 50 gallons; one drum of thinner containing 50 gallons and one drum of castor oil containing 22 gallons. A further claim was made for the containers, all of which aggregated $123.77.

Plaintiff in his statement of claim gave the defendant credit for giving him two checks, one for $61.94 and the other for $23.10, totalling $85.04. The defense interposed was that the two checks given by defendant to plaintiff were in full of plaintiff's claim and that plaintiff had made no claim for any balance until he brought his suit.

Plaintiff testified that when he sold the goods in question to defendant the price quoted was "cost---Specified on the invoice" and that he mailed defendant the invoice and later received the two checks; that about a month later he called the defendant on the telephone and asked for the balance; that the defendant swore at him and hung up the receiver and that plaintiff had no communication with defendant since that time; that at the time of the sale he did not know the market price of the merchandise he sold to defendant.

38370

PHILIP FOSS,
plaintiff,

vs.

ROBIN E. SHEPHERD,
defendant.

ATTACH CHECK AUDITOR'S COPIES

DO NOT DETACH.

266 I.W. 600

DO NOT REMOVE THIS DETAILS OR USE WHERE.
CO. CHECKING ACCOUNT

He further testified that when the containers were returned to the manufacturer the manufacturer would pay a certain amount for each; that when defendant gave him the two checks he told defendant that was not all that was due him; that defendant replied he would pay the balance in about a week; that he did not have any idea what the two checks were for but that he cashed them.

The defendant testified that shortly before the transaction in question plaintiff told him he was about to go out of business and wanted defendant to do him a favor and buy the balance of the merchandise plaintiff then had on hand; that the merchandise would be sold at the "Market price, less fifteen per cent;" that the goods were delivered and plaintiff called for the money; that defendant's foreman was present; that the check for $61.94 was made out and given to plaintiff in full payment of the merchandise; that plaintiff then requested payment for the containers and defendant stated they would not be emptied and returned to the manufacturer for some weeks, and he would then pay for them; that plaintiff stated he needed the money and as a favor to plaintiff defendant gave him the other check for $23.10; that the other container would be returned later; that later the manufacturer would not receive it because it appeared to be somewhat damaged and defendant held it for plaintiff. Defendant's foreman gave testimony substantially to the same effect. The testimony of the defendant and the foreman was further to the effect that at the time payment was made by defendant to plaintiff, an invoice was made out by defendant and the original given to plaintiff, showing in detail the quantity and price per gallon, total amount due less fifteen per cent, which was $61.94. Defendant's counsel served a notice on plaintiff, prior to the trial, to produce the original, but plaintiff or his counsel stated they did not have such invoice. Defendant denied there was any balance due or that plaintiff had ever asked him

for any balance, and denied that he received any invoice from the plaintiff.

From the foregoing, which is the substance of all the evidence in the record, it is apparent that there is a conflict in the evidence, but upon a careful consideration of all the evidence in the record, we are of the opinion that the finding and judgment is against the manifest weight of the evidence, and in this state of the record it is out duty, under the law, to reverse the judgment. Donelson v. East St. Louis Ry. Co., 235 Ill. 625.

Plaintiff's testimony is not satisfactory. It is to the effect that he sold the merchandise at "cost" but he gave no testimony as to what the cost was, and further, that he did not know the market price of the merchandise. The defendant's testimony is that the $61.94, which he paid plaintiff was in full for the goods at the market price, less fifteen per cent, and the market price is testified to. Defendant's further evidence is to the effect that at that time plaintiff requested, as a favor, that defendant pay for the containers, and thereupon defendant gave plaintiff the check for $23.10, being the price of the two containers less certain freight charges. It seems strange that these two checks should be for odd amounts if the defendant's testimony is not true. Since we are of opinion that the finding and judgment is against the manifest weight of the evidence, the judgment must be reversed with a finding of fact. Mirich v. Forschner Contracting Co., 312 Ill. 343.

The judgment of the Municipal court of Chicago is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

McSurely and Matchett, JJ., concur.

for any purpose, and should then be received any injuries from the plaintiff.

From the foregoing, rules: is the acceptance of all the evidence in the record, it is apparent that there is a conflict in the evidence, but upon a careful examination of all the evidence in the record, we are of the opinion that the finding and judgment is against the manifest weight of the evidence, and in this state of the record it is our duty, under the law, to reverse the judgment. Dowling v. Natl. Ct. Equip Co., 208 Ill. App.

Plaintiff's testimony is not satisfactory. It is to the effect that he only had the defendant as "agent" but he gave no testimony as to what the agent was, who furnish, that he did not know the market price of the merchandise. The defendant's testimony in the Bel.Ky, which he said plaintiff was in full for the goods at the market price, less fifteen per cent, and the market price is testified to. Defendant's further evidence is to the effect that the plaintiff requested, as a favor, that defendant pay for the merchandise, and thereupon defendant gave plaintiff the check for $85.10, being the price at the two counterpane less certain freight charges. It seems strange that these two checks should be for odd amounts. It seems strange that plaintiff's testimony is not true. Since we are of opinion that the finding and judgment is against the manifest weight of the evidence, the judgment must be reversed and a finding of fact. Dietch v. Forrester Construction Co., 216 Ill. App.

The judgment of the municipal court of Chicago is reversed with a finding at fact.

REVERSED AND A FINDING OF FACT.

Mcgurely and Sullivan, JJ., concur.

35779 FINDING OF FACT.

We find as a fact that the defendant paid plaintiff the full amount of plaintiff's claim on October 6, 1930, when he gave him the two checks.

58770 Standing by Pact.

We find as a fact that the Defendant paid directly the full amount of plaintiff's claim on October 6, 1930, when he gave him the two checks.

35800

WESTERN SCREEN MFG. CO.,
a Corporation,
Appellant,

vs.

THE AUTOMOBILE RETAILING CORPORATION,
a Corporation, formerly ANCOR-ILLINOIS
CORPORATION, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

266 I.A. 601

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

On February 3, 1931, plaintiff caused judgment by confession to be entered against the defendant in the Municipal court of Chicago. The confession was on a written lease and was for rent claimed for August, September, October and November, 1930, at $75 a month, making $300 plus $50 for attorney's fees. Afterward this judgment, on motion of the defendant, was opened up and it was given leave to defend. The case was later heard by a jury and there was a verdict and judgment in the defendant's favor, and plaintiff appeals.

The lease covered a period from December 1, 1929, to November 30, 1930. The premises were described in the lease as "The entire building situate and known as 4425 W. Kinzie St.", to be occupied for offices and storage. The monthly rent of $75 was payable in advance on the first of each and every month. The defendant paid all rent under the lease, including July, 1930. July 14th the premises were partly destroyed by fire and rendered untenantable. The uncontradicted evidence is that a day or two afterward the landlord, president of the plaintiff, discussed the matter with defendant's representatives and the substance of what took place is that plaintiff's president stated plaintiff would not repair the damage done by the fire, and thereupon defendant's representatives told him defendant would vacate the premises, which he said it could do, and on the last day of July defendant vacated the premises.

23800

EXCHANGE BUREAU MAY. C.,
e Corporation,
employees,

vs.

THE [illegible] CORPORATION,
e Corporation, formerly known-ITED
Corporation, a Corporation,
Appellee.

256 I.A. 601.

CLERK OF DISTRICT.

ON EXCEPTIONS FROM DISTRICT
DEPARTMENT OF THE COURT.

On January 3, 1921, petitioner moved judgment in accordance with its exceptions to the master's report, which he duly filed with the clerk of this court on the 31st day of May, 1920. The motion was denied by the court, and petitioner excepted to the ruling. The case was tried upon the pleadings, on motion of the defendant, and judgment was rendered for the defendant's counterclaim for $1,000, with interest from January 3, 1921, and costs. The petitioner assigns as error the refusal of the court to enter judgment in favor of the plaintiff for the amount claimed in the complaint, and the entry of judgment for the defendant's counterclaim for $1,000, with interest from January 3, 1921, and costs. The petitioner assigns as error the refusal of the court to enter judgment in favor of the plaintiff for the amount claimed in the complaint, and the entry of judgment for the defendant's counterclaim for $1,000, with interest from January 3, 1921, and costs.

The facts are stated in the opinion of the court.

Mr. [illegible] for the plaintiff in error.

Mr. [illegible] for the defendant in error.

Mr. Justice [illegible] delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of [illegible], to review a judgment of that court affirming a judgment of the District Court of [illegible] County, in favor of the defendant in error, plaintiff below, for the sum of $1,000, with interest from January 3, 1921, and costs. The petitioner assigns as error the refusal of the court to enter judgment in favor of the plaintiff for the amount claimed in the complaint, and the entry of judgment for the defendant's counterclaim for $1,000, with interest from January 3, 1921, and costs. The petitioner assigns as error the refusal of the court to enter judgment in favor of the plaintiff for the amount claimed in the complaint, and the entry of judgment for the defendant's counterclaim for $1,000, with interest from January 3, 1921, and costs.

The lease contained the following provision: "In case said premises shall be rendered untenantable by fire, *** Lessor may, at his option, terminate this lease or repair said premises within sixty days. If Lessor does not repair said premises within said time,*** the term hereby created shall cease and determine."

While, as stated, plaintiff caused judgment to be entered for rent claimed for the four months of August, September, October and November, 1930, at $75 per month, making a total of $300, yet in this court it shifts its position and says that it was entitled to rent for but 60 days after the fire, or $102.50, its theory being that under the provision of the lease above quoted, the defendant would be liable for rent for a period of 60 days after the premises were rendered untenantable by the fire, and Wells v. Stone Co., 264 Ill. App. 326, is cited. The provision of the lease in that case is somewhat analogous to the provision in the lease before us, but the other facts are different.

We think the plaintiff's contention is unsound both under the terms of the lease and under the undisputed evidence. The lease provided that if the premises were rendered untenantable by fire, the landlord might terminate the lease or repair the damage within 60 days; that if the lessor did not repair the premises within that time the term covered by the lease would "cease and determine." Under this provision we think the landlord had 60 days within which to make the repairs, not 60 days within which to commence to make them. No attempt was made to repair the premises, but on the contrary plaintiff stated it would not do so. Under the uncontradicted evidence, we think it would unconscionable to allow plaintiff rent for the premises for a period of 60 days when they were rendered untenantable by the fire, and when plaintiff, a day or two after the fire, stated that it would not make the repairs. Any doubt

as to the meaning of the provision of the lease above quoted, under a long established rule of law, is to be resolved against the landlord. Moreover, the undisputed evidence is that within a day or two after the fire, July 14th, plaintiff through its president stated that the landlord would not make the repairs and the tenant thereupon stated that since the landlord would not make the repairs it would vacate, and this was agreed to by the president and the premises were vacated on the last of July. In the absence of proof to the contrary, the president of a corporation will be presumed to have authority to bind the corporation as one of the powers incident to his office. Quigley v. MacQueen & Co., 321 Ill. 124; Bloom v. Vehon Co., 341 Ill. 200; Peoria Life Ins. Co. v. Int. Life and Annuity Co., 246 Ill. App. 38; Eagle v. Hanson Co., 262 Ill. App. 160. And it has long been the settled law of this State that a lease under seal may be abrogated, cancelled and surrendered by an executed parole agreement. Alschuler v. Schiff, 164 Ill. 290; Langendorf v. Ritter, 225 Ill. App. 466; Foreman-State Tr. & S. Bank v. Demeter, 347 Ill. 72. Defendant having vacated the premises it cannot, under the circumstances, be held for rent after it vacated.

The defendant filed an additional abstract in this case, which shows the testimony of the witnesses. None of this was abstracted in the original abstract filed by plaintiff. The additional abstract was necessary for a decision of this case and therefore the cost of it is taxed against the plaintiff.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

as to the meaning of the provision of the lease above quoted, under a long established rule of law, it is to receive against the lessor. Moreover, the undisputed evidence is that within a day or two after the fire, July 14th, plaintiff informed the president stated that the landlord would not make the repairs and the tenant therefore stated that since the landlord should not make the repairs it would vacate, and this was agreed to by him accordingly and the premises were vacated on the 16th of July. In the absence of proof to the contrary, the presumption of a surrender will be presumed to have authority to bind the corporation in any of the respects indebt to its action. Heisler v. Davenport & Co., 221 Ill. 154; Stone v. Vadon Co., 241 Ill. ---; Peoria Life Ins. Co. v. Ins. Life and Annuity Co., 248 Ill. 494; 96; Ehrle v. Chicago Co., 252 Ill. 492. 100. And it was long then the settled law of this State that a lease under seal may be terminated, implied and surrendered by an executed parole agreement. Blackwell v. Smith, 244 Ill. 99; Lauenhorf v. Silver, 240 Ill. 402. 404; Corcoran-Stone Co. v. Park v. Dupree, 249 Ill. 72. Important matter showing the premises it owned, after the circumstances, is only two years after it vacated.

The defendant filed no additional abstract in this case, which shows the condition at the time. Even if this was attempted in the original abstract filed by plaintiff. The additional abstract was considered for a decision of this case and therefore the case of is the same opinion the plaintiff.

The judgment by the municipal court of Chicago is affirmed.

affirmed.

Respectfully submitted, H., counsel.

35384

4274

LORRAINE HAWKINS, a Minor, by JAMES HAWKINS, her father and next friend,
Defendant in Error,

vs.

EDGAR McCLUN,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

266 I.A. 601

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Lorraine Hawkins, a minor eleven years of age (hereafter called plaintiff), brought suit to recover compensation for personal injuries received in a collision between an automobile driven by defendant and the automobile in which she was riding as a passenger, and upon trial had a verdict for $30,000. Defendant appeals from the judgment on the verdict.

The accident happened at the intersection of South Park avenue and 69th street in Chicago at about two o'clock on the morning of April 27, 1930. The car in which plaintiff was riding was driven by her father, James Hawkins; her mother sat in the front seat with him while she was sitting alone in the back seat. There is a conflict in the evidence as to the speed of the respective automobiles and the distance they were from the street intersection when the driver of each saw the other car, and in other respects. However, the jury could properly believe that as the car in which plaintiff was riding was going south on South Park avenue and approaching 69th street it was going from 18 to 20 miles an hour; that there was no other traffic on South Park avenue to distract attention; that this is a through street and on its east side at 69th street is a large electric sign with the words "Stop - Through Street" in big letters; that the intersection is well lighted that plaintiff's father looked in both directions and says he saw no traffic until he was crossing the north crosswalk of 69th street,

266I.A.601

33584

LOUISAIRE MARCHIS, a minor, by
JAMES MARCHIS, her father and
next friend,

Defendant in Error,

vs.

EDGAR ROGERS,

Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Lafrance Marchis, a minor eleven years of age (however small plaintiff), brought suit by (whose) guardian ad litem for personal injuries received in a collision between an automobile driven by defendant and the motorcycle he was riding as passenger, and upon trial a verdict for $30,000. Defendant appeals from the judgment on the verdict.

The accident happened at the intersection of North Park avenue and 30th street in Chicago at about two o'clock on the morning of June 27, 19--. The car in which plaintiff was riding was driven by one Turner, Jack's cousin; her account of it was that she was visiting alone in the home about three miles to the north and was driving home; that as she approached the intersection she brought the machine down to about ten miles an hour; that just as she was entering it she noticed defendant's car coming from her right at a speed of from 30 to 35 miles an hour; that she then realized an immediate collision was inevitable and that she put on the brakes, and in other respects, however, the two boys stoutly believe that as the machine went into the street car it was riding free 10 or 20 feet in front of the driver of each car in which they were riding, and that the latter's testimony to the effect that the car was going at a high rate of speed is therefore not to be credited. There is a conflict in the evidence as to the speed of the respective cars, but there is no question but that the defendant's car was driven into the side of the car in which plaintiff was riding with sufficient force to throw the latter's body over the top of the car and to the ground on the opposite side, and that plaintiff was injured thereby. There is a conflict in the evidence as to the nature and extent of the injuries received by plaintiff, but it was agreed that he received a fracture of the left leg between the knee and ankle, and that he was confined to his bed for a period of about six weeks, and that he suffered a permanent injury to his left leg, which is shorter than the right one, and that he will limp as a result of the injury.

when he observed defendant's car 40 or 50 feet east of the east crosswalk and going 50 or 55 miles an hour or better; that it did not slow up or stop for the through street but continued to cross South Park avenue, striking the car in which plaintiff was riding on the left rear wheel, breaking its rear axle, throwing it over to the southwest corner of the intersection and turning it over on its side. Immediately after the accident a west-bound street car came to a stop at the intersection and the motorman went over to speak to the defendant who, without stopping to give his name or address or to ascertain what damage was done, started to drive away from the scene. Plaintiff's father had in the meantime gotten out of his wrecked car and, jumping on the runningboard of defendant's automobile, took hold of defendant's steering wheel and succeeded in stopping the car by turning it into the side of the street car. A policeman was sent for and defendant again attempted to leave the scene but was prevented by the police officer who took him to the police station. There was believable evidence that defendant appeared to be intoxicated at the time.

Besides the defendant there were two other adults riding in his car at the time. They gave evidence tending to show that defendant's car was driven slowly just before the accident, that it stopped at the east crosswalk of the street intersection, and in other respects contradicted evidence given on behalf of plaintiff.

In a case of this kind it is peculiarly within the province of the jury to pass upon the credibility of the witnesses and to determine the facts. Accepting the version of the accident presented on behalf of plaintiff, the jury could properly conclude that the charge of negligence against defendant was amply proven.

In the second and fourth counts of plaintiff's declaration it was alleged that the injuries were wilfully and wantonly inflicted. A special interrogatory was submitted to the jury as to

when he observed defendant's car 40 or 50 feet west of the east
crosswalk and going 30 or 35 miles an hour or faster; that it did
not slow up or stop for the crosswalk except but continued to cross
South Park avenue, striking the car in which plaintiff was riding
on the left rear wheel, demolishing its rear axle, throwing it over to
the southwest corner of the intersection and turning it over on
its side. Immediately after the accident a man-hound street car
came to a stop at the intersection and the motorman went over to
speak to the defendant who, without stopping to give his name or
address or to ascertain what damage was done, started to drive
away from the scene. Plaintiff's father had in the meantime taken
out of his wrecked car and, jumping on the runningboard of defend-
ant's automobile, took hold of defendant's steering wheel and ma-
neuvered it to the curb by turning it into the side of the street
car. A policeman was sent for and defendant again attempted to
leave the scene but was prevented by the police officer who took him
in the police station. There was sufficient evidence that defendant
appeared to be intoxicated at the time.

During the argument there arose the issue which is
now before us. They made extensive reading in some text be-
fore the jury to show the responsibility of the plaintiff.
Defendant's car was struck exactly just before the accident, that it
stopped at the east crosswalk of the street intersection, and it
other reasons undisputed evidence gives no ground of plaintiff.
In a case of this kind it is peculiarly fit in the province
of the jury to pass upon the credibility of the witnesses and to
determine the facts. Regarding the version of the accident pre-
sented on behalf of plaintiff, the jury could properly conclude
that the change of negligence against defendant was amply proven.
In the second and fourth counts of plaintiff's indictment
it was alleged that the injuries were willfully and wantonly in-
flicted. A special interrogatory was submitted to the jury as to

whether the automobile was driven by defendant wilfully and wantonly against the car in which plaintiff was riding, to which the jury returned an answer in the affirmative. Defendant's counsel argues that there was no evidence to sustain the wilful and wanton counts. What constitutes wilful and wanton conduct in such cases has been repeatedly stated. It does not necessarily mean that a defendant is actuated by ill will toward the plaintiff. It is such conduct as exhibits a reckless disregard for the safety of others. Mantonya v. Wilbur Lumber Co., 251 Ill. App. 364; Brown v. Illinois Terminal Co., 319 Ill. 326. Defendant testified that he first saw the car in which plaintiff was riding when it was about 250 feet north of the street intersection. The jury could properly believe that, disregarding the stop sign and the rule of the right of way, he continued across the intersection at a high rate of speed, and could properly conclude that his conduct exhibited a reckless disregard of the safety of others.

Defendant asserts that a general verdict based on counts of general negligence and counts of wilful and wanton conduct can not stand when the evidence does not support the wilful and wanton counts. Even were this the rule it would not be applicable in this case; but we have held, in the recent case of Price v. Bailey, 265 Ill. App. 358, [illegible], that this is not the rule. Note particularly the specially concurring opinion.

No error was committed in permitting evidence as to the amount expended for medical services. The declaration alleged that the father and mother had assigned their right to recover money so expended. A parent may relinquish his right to the earnings of his child and this may be inferred from the conduct of the parent; and the prosecution of a suit by the father as the next friend is equivalent to a relinquishment on the part of the father of his right to collect the earnings of the child. Boharski v. Rudnicki,

safety

Ill. App. 338,

246 Ill. App. 603.

The case seems to have been tried in the spirit of personal antagonism between the respective counsel. Much of the brief for defendant is a presentation of **alleged** improper conduct on the part of plaintiff's attorney. The bickerings and sparring were highly improper and in disregard of the obligation of attorneys to try their cases with dignity and decorum. However, we are of the opinion that the record shows that the attorney for the defendant was much the greater offender and that the contentious atmosphere surrounding the trial was largely caused by him.

There was no reversible error in the rulings of the court. Considering the circumstances of the trial, the conduct of the court deserves commendation. His rulings were fair and his remarks were wisely directed toward obtaining an orderly trial.

It is asserted that the court improperly refused two special interrogatories which defendant requested be given to the jury. These were in substance whether the defendant was intoxicated at the time of the accident and whether such intoxication, if any, contributed to the injury of plaintiff. These interrogatories were properly refused. A special interrogatory is not proper unless it relates to one of the ultimate facts and unless an answer responsive thereto would be inconsistent with the general verdict that might be returned. Interrogatories which ask for a finding of mere evidentiary facts are not proper. Wicks v. Cuneo-Henneberry Co., 319 Ill. 344.

Complaint is made about a certain instruction which is not identified in defendant's brief except by reference to a page of the abstract on which appear parts of three instructions. Instructions criticised should be set out in the brief. General Platers Supply Co. v. L'Hommedieu & Sons Co., 228 Ill. App. 201. However, the point seems to be that to recover under an ordinance of the City of

Chicago it must be proved that the accident happened within the city. We think the venue was admitted by counsel for defendant.

Complaint is made that the witness police officer O'Brien, while court and counsel were in chambers, tried to ingratiate himself with the jury by smiling and remarking, "It's too hot for all you guys to be hanging around here. We all ought to be out to the ball game." While this conduct cannot be approved we cannot say that it amounts to prejudicial error.

The verdict was for $30,000, and it is claimed that this is excessive. The doctor who treated plaintiff testified that when he first saw her she had numerous lacerations on her face and the upper left leg; that there was a complete laceration of the left eyeball, and there was no possibility of saving the eye, which was removed the next day, and she was fitted with a glass eye.

As we have said elsewhere, nothing is more difficult than to arrive at a satisfactory conclusion as to the just amount of compensation, in terms of money, which should be allowed for injuries to the person. One jury will award a certain amount, while, for the identical kind of injury, another jury will award many times that amount, or very much less. This is forceably shown in a list of verdicts for the loss of one eye in over one hundred cases appearing in Parmele on Damage Verdicts, vol. 1, commencing on page 323. The largest amount was $20,000, reduced from $30,000. The amounts range downward from this to as low as $500. By far the larger number of verdicts are under $10,000. A somewhat similar list appears in Sutherland on Damages, vol. 4, page 4812. The largest verdict we have been able to find is in Maede v. Oakland High School Dist.etc., 291 Pac. Rep. (Calif.) 874, where a judgment of $35,000 for the loss of an eye was sustained; but the reviewing court seems to have rested its conclusion on its disavowal of responsibility in every such case, saying that its power over excessive damages "exists only when the

Chicago it must be proved that the accident happened within the city.
We think the venue was admitted by demurrer to the declaration.

Complaint is made that the witness Police Officer O'Brien, while under any covenant was in accordance, tried to interpolate himself with the jury by writing one remarking, "it's the act for all you time." While this complaint cannot be included we cannot say that it amounts to prejudicial error.

The verdict was for $50,000, and it is claimed that this is excessive. The doctor who treated plaintiff testified that when first saw her she had numerous lacerations on her face and the upper left leg; that there has a complete laceration of the left kneecap, and there was no possibility of having the eye, which was removed the next day, and she was fitted with a glass eye.

As we have said elsewhere, nothing is more difficult than to arrive at a satisfactory conclusion as to the just amounts of compensation. In cases of this kind, juries should be allowed for injuries to the person. The jury will award a certain amount, while, for the identical kind of injury, another jury will award many times that amount, or very much less. This is forcibly shown in a list of verdicts for the loss of one eye in over one hundred cases appearing in Farmele on Damge Verdicts, vol. I, commencing on page 232. The largest amount was $50,000, reduced from $75,000. The smaller range downward from this to as low as $50. Or for the larger number of verdicts are at $10,000. A somewhat similar list appears in Sutherland on Damages, vol. 4, page 4013. The largest verdict we have been able to find is in Cassin v. Delaware [illegible] Lack. &
Wes. Rail. (Cent.) 374, where a judgment of $75,000 for the loss of an eye was sustained; but the reviewing court seems to have treated

facts are such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury." On the other hand, in Cook v. Mo. P. R. Co., 94 Mo. App. 417, a verdict for $2500 for the loss of one eye was held to be excessive, while in Girdzus v. Van Etten, 211 Ill. App. 524, opinion by Mr. Presiding Justice O'Connor, it was held that a verdict of $7000 was not excessive in the case of a boy losing the sight of one eye.

From a consideration of this large number of cases, showing the opinions of many juries, we can arrive at an approximately reasonable conclusion as to what would be the fair and just compensation for the loss of an eye. We are of the opinion that the amount of the verdict of $30,000 is excessive and that it should be reduced to $15,000, which would still be above the average of awards for a like loss. If, therefore, the plaintiff will within ten days from the date of the filing of this opinion, file a remittitur of $15,000 the judgment will be affirmed for $15,000; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

35587

KENNETH M. IDLE,
Appellee,

vs.

CONTINENTAL COFFEE CO.,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

43 7

266 I.A. 601

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $25,000 entered upon the verdict of a jury in the trial of an action whereby plaintiff sought to recover damages for injuries said to have been sustained by him through the negligence of the defendant in the operation of its motor truck.

June 25, 1930, plaintiff was driving westward in Chicago on North avenue in a Ford sedan; a street car going westward stopped at a cross street and was discharging passengers; plaintiff stopped his car and apparently almost immediately saw defendant's truck approaching from behind; it struck plaintiff's car and plaintiff felt his head snap back, with consequences which will be hereafter discussed.

The defendant's truck was about the same weight as the car of plaintiff. Defendant's driver says that when the street car came to a sudden stop plaintiff did likewise, and that he, following eight or ten feet behind plaintiff, was unable to stop quickly so that he hit plaintiff's right rear fender with the fender of his truck. A picture of plaintiff's car taken after the accident is in the record; it shows a dent in the right rear fender, although it is argued that the spokes in the spare wheel of plaintiff's car were also damaged. At the time of the accident plaintiff's car was not in gear and his brakes were loose; according to defendant's driver, plaintiff's car did not move to exceed two feet; plaintiff says it went ahead six or seven feet. Both men got out of their

KENTUCKY N. I.R.R.,
Appellee,

vs.

COAL MINING CO.,
& Corporation,
Appellant.

Appeal from Circuit Court
of Clay County.

AM. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $37,000 entered upon the verdict of a jury in the trial of an action whereby plaintiff sought to recover damages for injuries said to have been sustained by him through the negligence of the defendant in the operation of its motor truck.

June 25, 1920, plaintiff was driving westward in Madison on Morris Avenue in a Ford sedan; a street car going westward stopped at a cross street and two disembarking passengers; plaintiff stopped his car and apparently almost immediately saw defendant's truck approaching from behind; it struck plaintiff's car and plaintiff left his hand and foot brakes entirely to determine disposed.

The defendant's truck was about the same weight as the car of plaintiff. Defendant's driver says that when the street car came to a sudden stop plaintiff did likewise, and that he, following eight or ten feet behind plaintiff, was unable in good safety to stop his truck. A picture of plaintiff's car taken after the accident is in the record; it shows a dent in the right rear fender, although it is argued that the spoke in the spare wheel of plaintiff's car was also damaged. At the time of the accident plaintiff's car was not in gear and his clutch was loose; according to defendant's driver, plaintiff's car did not have to exceed two feet; plaintiff says it went about six or seven feet. Both men got out of their

respective vehicles and examined the extent of the damage and exchanged cards giving their addresses. Plaintiff then got back into his car and drove to Howe Brothers, from whom he bought it, for the purpose of getting an estimate of the cost to repair the damages; he then started to drive to the place of business of the defendant; plaintiff says his back hurt him so he turned around and drove back to Howe Brothers and from there drove west on Grand avenue to the corner of Belmont avenue, where he was examined by a Dr. Summers.

The controversy in this court relates as to the extent of plaintiff's injuries.

Dr. Summers at the time when he first saw plaintiff had been practicing at his profession for about seven months. From plaintiff's recital of his symptoms the Doctor evidently suspected some serious trouble in the neck; X-ray pictures were taken and from reading these he concluded that there was a compressed fracture of the sixth cervical vertebrae; the hospital record sheet shows this diagnosis in his writing. Dr. Summers ordered plaintiff's body and neck to be encased in a plaster paris cast and that he be put to bed, where he remained three or four months; the cast was removed at the end of two months and a metal brace applied supporting the head and neck from the shoulders and with the chin resting in a cup, holding the head immobile. Plaintiff wore this constantly for some ten months, including his sleeping hours, removing it only a few times. Upon the trial he testified, still wearing this brace, with a beard of long standing and with long hair, looking very pale.

We are of the opinion, however, that the greater weight of the evidence shows that Dr. Summers was mistaken in his diagnosis of a fractured cervical vertebrae, and that the heroic treatment of the plaster cast and steel brace was uncalled for. Upon the trial he was shown the same X-ray pictures upon which he had based his original diagnosis, and testified that it showed "no marked

pathology;" that it only showed a slight difference vertically between the sixth cervical vertebrae and the one above it; he said that the pathology shown in the X-ray picture "is not marked enough to bear out the symptoms the patient gave." Dr. Mitchell, testifying on behalf of plaintiff, was shown the same pictures and in answer to the question as to whether they showed "a fracture of any vertebrae there, or anything like that," answered, "Positively no." This witness also testified that it was mechanically impossible to receive a compressed fracture of the cervical vertebrae by having the head thrown backward.

It was developed from the plaintiff that he had X-ray pictures taken by Dr. Mubeny. This Doctor was not put on the stand by plaintiff but was subpoenaed by defendant; he testified that the X-ray pictures taken by him about ten days before the trial showed no evidence of disease of any kind; that there was nothing abnormal or anything significant, the vertebrae "seems quite normal;" that if there had been a compressed fracture it would have shown in the density of the film at the point where the alleged fracture took place, particularly if it had healed. Other physicians gave evidence tending to show that a fractured vertebrae would be shown by an X-ray picture.

The attorney for the plaintiff did not claim upon the trial that there was in fact a compressed fracture of the vertebrae as diagnosed by Dr. Summer, but presented the theory that by reason of the injuries to the neck there had been serious impairment of the nerves, and physicians testifying as experts gave their opinion that there was some causal connection between the accident and many of the symptoms presented by plaintiff. On the other hand, doctors testified that many of plaintiff's symptoms were caused by the treatment he had received, especially by wearing the plaster cast and the brace. It seemed to be the

concensus of medical opinion that if the brace were removed and the plaintiff subjected to treatment calculated to restore the atrophied muscles by massage or other methods, there would be a return to health.

There was submitted to the jury a mass of expert medical testimony in the jargon of the profession, with the use of many technical anatomical words very rarely if ever used by laymen. It must have been almost impossible for the jury to get from this welter of words any concrete fact on which to base a well considered opinion as to how badly plaintiff had been injured in the accident; but the pitiful appearance of the plaintiff would stand out as a concrete spectacle which was understandable. As we have indicated, he gave an abnormal picture of the real injuries which were directly caused by the accident. We should not approve a verdict evidently based upon the assumption that plaintiff had a fractured vertebrae, when the greater weight of the evidence shows to the contrary.

We should not be understood as holding that a negligent defendant cannot be held answerable in damages, even where it is shown that the medical diagnosis and treatment of plaintiff's injuries are improper. A person suffering from an injury is only required to use reasonable diligence to employ a physician of ordinary skill and ability to treat him, and the law regards the injury resulting from the mistakes of the physician as a part of the direct damages flowing from the original injury. Variety Mfg. Co. v. Landaker, 227 Ill. 22; Horney v. St. Louis & Northeastern Ry. Co., 165 Ill. App. 547; Guth v. Vaughan, 231 Ill. App. 143; 6 Thompson on Negligence, Sec. 7211.

The error in the instant trial was that this phase of the case was wholly disregarded. Plaintiff submitted himself to the jury as suffering from a fractured neck, although before the

trial there developed convincing reasons to believe to the contrary.

Plaintiff should be encouraged to submit himself to restorative treatment before the next trial. We cannot conceive how it would injure his case to make some attempt to improve his personal appearance. Not to do this might suggest malingering.

The verdict was the result of an unwarranted appeal to sympathy. We shall therefore reverse the judgment and remand the cause for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., dissents.

Matchett, J., concurs.

trial there developed overwhelming reasons to believe to the contrary.

Plaintiff should be encouraged to submit himself to restorative treatment before the next trial. We cannot conceive how it would injure his case to make some attempt to improve his personal appearance. Nor to do this might suggest malingering.

The verdict was the result of an unwarranted appeal to sympathy. We shall therefore reverse the judgment and remand the cause for another trial.

REVERSED AND REMANDED.

Matchett, J., concurs.

O'Connor, P. J., dissents.

35706

LOUIS GLICKMAN,
Defendant in Error,

vs.

ESER SCHULTZ and FANNIE SCHULTZ,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

266 I.A. 601

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants by this writ of error seek the reversal of a judgment for $6351.05, entered upon the verdict of a jury in an action at law upon promissory notes dated November 26, 1929, made by them to order of bearer, secured by a trust deed upon real estate in Chicago. Judgment was originally entered against defendants by confession; on motion leave was given to defend, the judgment to stand as security; there was a trial in October, 1930, but being unable to agree the jury was discharged. In December there was a second trial with a verdict for plaintiff, and motion for a new trial was allowed. The third trial was in October, 1931, when the present verdict and judgment for plaintiff were entered.

Defendants first say there was no proof that the notes were delivered to plaintiff. The notes were introduced in evidence "on behalf of the plaintiff" by his counsel. Possession by one claiming to own a note is prima facie evidence that it has been delivered to him. Stitzel v. Miller, 157 Ill. App. 390; Negotiable Instruments act, ch. 98, sec. 37. In defendants' affidavit, filed to open up the judgment and which stood as the affidavit of merits, defendants asserted that they delivered the notes to Charles B. Goodman, an attorney, who delivered them to the plaintiff. This was an admission of delivery to the plaintiff.

Defendants assert that when plaintiff agreed to make a loan defendants did not have title to the real estate offered as security, having only a master's certificate which had been assigned as collateral to the Community State Bank; that plaintiff was informed

28708

LOUIS CLOCKEN,
Defendant in Error,

vs.

SARA SCHULTZ and FANNIE SCHULTZ,
Plaintiffs in Error.

2966 I.A. 601

ER. JUSTICE MCCONNELL DELIVERED THE OPINION OF THE COURT.

Defendants by title writ of error from the reversal of a judgment for $2000.00, entered upon the verdict of a jury in an action at law upon promissory notes dated November 20, 1905, made by them to order of Peaker, secured by a trust deed upon real estate in Quincy. Judgment was originally entered against plaintiffs by confession; on motion Index was filed, the judgment to stand as security; there was a trial in October, 1910, but being unable to agree the jury was discharged. In December there was a second trial with a verdict for plaintiff, and motion for a new trial was filed. The third trial was in October, 1911, when the present verdict was returned for plaintiff upon default.

Defendants first say there was no proof that the notes were delivered to plaintiff. The notes were introduced in evidence "on behalf of the plaintiff" by his counsel. Possession by one claiming to own a note is prima facie evidence that it was delivered to him. Ellicott v. Pettit, 129 Ill. 160. See; Daniel Negotiable Instruments, sh. 824, par. 77. In Edwards' Bailments, "Held to claim as the judgment and notes record on file Elizabeth of Morris, Defendants asserted that they relieved the note in Chester E. Cockson, as attorney, and declared that is the plaintiff. This was an implication of delivery to the plaintiff.

Defendants assert that the plaintiff agreed to make a loan satisfactory, stating only a contract between the parties, which required an agreement of the parties; that plaintiff was induced and influenced to the following effect that; that plaintiff was induced

of this and agreed to deposit the amount of the loan with "his attorney," Charles B. Goodman, and when defendants delivered the master's certificate to Goodman said Goodman would pay the amount of the loan; that pursuant to this the notes and trust deed were executed and delivered to Goodman as attorney for plaintiff, but that Goodman did not pay any part of the money to defendants nor to the bank which held the master's certificate as security; that the defendants never received any consideration for the execution of the notes.

Plaintiff having been called by defendants under sec. 33 of the Municipal court act, testified to the effect that Charles B. Goodman had been his lawyer in connection with the purchase of certain property; that Goodman had collected and was holding $2800 for him; that defendant Schultz spoke to plaintiff about a loan and plaintiff agreed to lend him $6000 on a second mortgage, deducting $600 as commission; that the parties met at Goodman's office for the purpose of closing the matter; plaintiff says that he gave Schultz $2600 in cash and that Goodman gave plaintiff his check for the $2800 he had collected for plaintiff; that both these items were given to Schultz, who then gave the notes to plaintiff; that he did not know that Schultz had only a master's certificate.

Defendants' counsel then attempted to lay the foundation for impeachment of plaintiff's testimony by asking him concerning his testimony at the prior trials. This was objected to by plaintiff's counsel and much of the record is filled with argument over the propriety of this rather unusual proceeding. We do not consider the matter of controlling importance. The witness, who evidently had difficulty with the English language, was naturally confused as to whether he was being questioned as to the transaction itself or as to the questions and answers upon the previous trials. Two witnesses employed in the office of defendants' counsel sought to

testify as to their recollection of plaintiff's testimony given upon the former trials, but upon objection this was excluded.

The briefs devote considerable space to the propriety of this procedure and the rulings of the court, but as we view it, the matters upon which it was attempted to impeach plaintiff were relatively unimportant. It is not controverted but that plaintiff parted with his money, and whether he got all or only a part from his safety deposit box or whether he gave it to the defendant Schultz personally or to Goodman, is unimportant, for Schultz permitted Goodman to hold it to be distributed as provided in a written agreement between them, hereinafter described.

Defendant Emer Schultz testified as to the execution of the notes in Goodman's office and says that after they were signed he turned them over to Goodman, whom he had known intimately eight or nine years; that Goodman had repeatedly represented him as his agent and attorney in business and in litigation; that at this time he had only the master's certificate to the property described in the trust deed. Both he and his wife testified that they never received anything for their notes.

Two witnesses testified that they were in Goodman's office at the time of this transaction, saw the defendants signing papers. One witness says that Goodman took them and gave them to plaintiff, saying, "Here are the notes and put them away with your valuable papers;" that plaintiff asked Mr. Schultz if he got the money, who replied "Yes." The other witness gave substantially the same testimony; that he heard plaintiff saying to Schultz, "Well, you have got your money and I have got the notes."

The written agreement above referred to was between Goodman, described therein as party of the first part, and the defendants, described as parties of the second part, and dated December 16, 1929 which was nearly three weeks after the execution of the notes in

question. After reciting the making of the $6000 loan it was provided that the proceeds therefrom, amounting to $5400, should be applied by Goodman to the payment of certain indebtedness of the defendants, to-wit, $2000 to Community State Bank (apparently this was to take up the master's certificate), and various sums to other parties; that the first party should pay, on behalf of the second parties, notes Nos. 1 and 2 for the sum of $100 each, and the first party should then retain the same uncancelled and the second parties agreed to pay them on August 1, 1931, with interest; that the second parties should deliver to the first party, on or about February 1, 1930, the master's certificate, and the master's deed when issued. It was stated that this arrangement was made for the reason that the second parties had not yet acquired absolute title to the premises "and the said second parties are satisfied and willing that the said first party shall retain the funds of the said loan as additional assurance that the title would be consummated." This agreement was in the possession of Goodman and his attorney. Plaintiff was not a party to and never saw it, and testified that he did not know that defendants had only a master's certificate and did not know that Goodman intended to hold the money in his possession until defendants got title. Whether Goodman carried out his agreement with defendants as to the disposition of the proceeds of the loan on their behalf does not appear except as they testified they never got any of the money. There is a statement in their affidavit of merits that Goodman had swindled certain persons and was confined in the county jail.

It is well settled that the burden of proving failure of consideration is upon the defendant who seeks to assert such a defense. American National Bank v. Woolard, 342 Ill. 148. Considering all the circumstances, we cannot say that the conclusion of the jury to accept the plaintiff's version of the transaction is

It is well settled that the burden of proving failure of consideration is upon the defendant who seeks to assert such a defense. Carleton National Bank v. Ordway, 340 Ill. 148. Considering all the circumstances, we cannot say that the conclusion of the jury to accept the plaintiff's version of the transaction is applied by Goodman in the payment of certain indebtedness of the defendants, to-wit, paying to Community Trust Bank (apparently this was to take up the maker's notes). And further even to other parties; that the first party should pay, on behalf of the second parties, notes Nos. 1 and 2 for the sum of $150 each, and the first party should then retain the same unnegotiated and the second parties agreed to pay them on August 1, 1931, with interest; that the second parties should deliver to the first party, as agreed about February 1, 1930, the maker's certificate, and the mortgage deed when issued. It was stated that this arrangement was made for the reason that the second parties had not yet received absolute title to the premises "and the said second parties may negotiate and utilize that the said first party shall retain the funds of the said loan as additional assurance that the title would be secured." This instrument was in the possession of Goodman and his attorney. Plaintiff was not a party to and never saw it, and testified that he did not know that defendants had only a master's certificate and did not know that Goodman intended to hold the money in his possession until defendants got title. Neither Goodman carried out his agreement with defendants as to the disposition of the proceeds of the loan on their behalf does not appear except as they testified they never got any of the money. There is a statement in their affidavit of merits that Goodman had retained certain persons and one contained in the county jail.

manifestly against the weight of the evidence. Defendant Schultz was not without experience in real estate transactions, and if he permitted plaintiff to take the notes and Goodman to retain the money, Goodman became his agent to apply the proceeds of the loan in accordance with the terms of the agreement between him and the defendants. The fact that Goodman failed in this respect would not affect the validity of the notes in plaintiff's possession. In McIntyre v. Yates, 104 Ill. 491, it was held that where one purchases mortgage notes he is not held responsible for the conduct of the agent of the mortgagor in his disposition of the money received.

As we have heretofore said, this case has been tried three times, with one disagreement and two verdicts for the plaintiff. We have no reason to believe that there would be any other result in a fourth trial. While the question involved is not free from difficulty and there may have been errors upon the trial, we are inclined to think that such errors, if any, were largely caused by defendants' counsel.

We see no sufficient reason justifying a reversal, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

manifestly against the weight of the evidence. Defendant Jenkins was not without experience in real estate transactions, and if he permitted plaintiff to hold the notes and Graham to retain the money, Graham became his agent to apply the proceeds of the loan in accordance with the terms of the agreement between him and the defendants. The fact that Graham failed in this respect would not affect the validity of the notes in plaintiff's possession. In McIntyre v. [illegible], 104 Ill. 461, it was held where one purchases mortgage notes he is not held responsible for the conduct of the agent of the mortgagor in his disposition of the money received.

As we have heretofore said, this case has been tried three times, with one disagreement and two verdicts for the plaintiff. We have no reason to believe that there would be any other result in a fourth trial. While the question involved is not free from difficulty and there may have been errors upon the trial, we are inclined to think that such errors, if any, were largely caused by defendants' counsel.

We see no sufficient reason justifying a reversal, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

35755

SECURITY BANK OF CHICAGO, a Corporation,
Appellee,

vs.

ELECTRIC CLOCK CORPORATION OF AMERICA, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

45 A

266 I.A. 602

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff claimed that pursuant to an agreement with defendant and a third party, the Krasberg Company, it became the owner of certain invoices for goods sold by Krasberg Company to the defendant, for which defendant promised to pay plaintiff. Defendant denied making such an agreement. Upon trial of the issue plaintiff had a verdict for $4938.36. From the judgment thereon defendant appeals.

The Krasberg Tool & Manfacturing Company was manufacturing clock motors for defendant, making deliveries of about 1500 motors a day; defendant was urging that deliveries be increased to 4000 a day. In April, 1930, Krasberg company was indebted to plaintiff on a note for $20,000, and over $11,000 to the defendant. The Krasberg company needed money to meet its pay-roll and it was evident that it could not continue business without raising money for that purpose. Defendant declined to advance any more money. Thereupon, William T. Brinkerhoff, vice-president of the Krasberg company, and William A. Heinze, its factory superintendent, with Henry T. Schiff, president of the defendant company, decided to approach the plaintiff with the view of obtaining money for the Krasberg company. About April 5th they met at the plaintiff bank and conferred with Norman B. Collins, its president. Although the testimony of Mr. Schiff is not wholly in accord with the other witnesses as to what took place at this conference, yet the jury could properly believe

38758

SECURITY BANK OF CHICAGO,
a Corporation,
Appellee,

vs.

ELECTRIC CLOCK CORPORATION
OF AMERICA, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF CHICAGO.

2661 A. 602

MR. JUSTICE MACKINLAY DELIVERED THE OPINION OF THE COURT.

Plaintiff claimed that pursuant to an agreement with Defendant and a third party, the Brayberg Company, it became the owner of certain inventions for clocks held by Brayberg Company in the defendant, for which defendant promised to pay plaintiff. Defendant denied making such an agreement. Upon trial of the issue plaintiff had a verdict for $4038.36. From the judgment thereon defendant appeals.

The Brayberg Taxi - Manufacturing Company was manufacturing clock motors for defendant, making deliveries of about 1500 motors a day; defendant was urging that deliveries be increased to 2000 a day. In April, 1930, Brayberg company was indebted to plaintiff on a note for $30,000, and over $11,000 to the defendant. The Brayberg company needed money to meet its pay-roll and it was evident that it would not continue business without relief money for that purpose. Defendant declined to advance any more money. Thereupon, William T. Brinkerhoff, vice-president of the Brayberg company, and William V. Holmes, its factory superintendent, with Henry K. Hewitt, president of the defendant company, decided to approach the plaintiff with the view of obtaining money for the Brayberg company. About April 9th they met of the plaintiff bank and conferred with Norman E. Collins, its president. Although the testimony of Mr. Hewitt is not wholly in accord with the other witnesses as to what took place at this conference, yet the jury could properly believe

that it was agreed between all of the parties that the Krasberg company would from time to time assign to plaintiff invoices covering clock motors sold and delivered to the defendant; that the plaintiff would lend to the Krasberg company the amount it required for its pay-roll and raw material, but not in excess of the face of the assigned invoices; that the defendant would pay to the plaintiff the face amount of these invoices after deducting 2% for cash and 25% to be retained by the defendant to reduce the indebtedness owing it from the Krasberg company. It was agreed that no deductions were to be made by defendant on account of defective merchandise and that the Krasberg company would replace defective motors without charge, so that the amount to be paid by defendant to plaintiff would not be affected. It was also agreed that any amount over and above that needed by the Krasberg company for its payroll and materials should be taken by plaintiff from the amount received from defendant and applied by plaintiff toward the payment of the $20,000 note of the Krasberg company held by it. It was the expectation of all parties that this arrangement would enable plaintiff to reduce the amount of Krasberg company's indebtedness to it, and the defendant would apply the amount of the 25 per cent deduction from the invoices to the Krasberg company's indebtedness to it.

Defendant argues that a letter written by it to the Krasberg company on April 9th contained the complete agreement of the parties and that nowhere therein is there a promise by defendant to pay the plaintiff anything. This letter is merely a statement from defendant to the Krasberg company showing the amount of the indebtedness of this company to the defendant and stating that after making the deductions of 2% for cash and 25% "to apply against the moneys due us," the defendant "will then issue check for the balance to the Security Trust & Savings Bank" (the plaintiff); there was also reference to the understanding as to defective motors. Plaintiff

is not suing upon this letter but it is evidence tending to confirm plaintiff's version of the oral agreement of the parties.

Plaintiff's claim is not based upon any guaranty by the defendant of the Krasberg account; its claim is based upon the agreement of the defendant, and the consideration for this was the undertaking of the plaintiff to advance moneys to the Krasberg company so that defendant would receive the clocks it wanted and at the same time reduce the indebtedness of this company to it. It was an arrangement for the benefit of all three parties. Defendant's agreement was simply an agreement to pay for the clocks purchased by it.

The statute of frauds is not involved, for the defendant's promise was to pay its own obligation for merchandise delivered to it. Darst v. Bates, 95 Ill. 493. Defendant's point of novation is without merit. There was no agreement contemplating the release of the Krasberg company from any of its existing indebtedness to the plaintiff.

Defendant says that it is entitled to set off against the plaintiff the indebtedness of the Krasberg company to it on the theory that the assignee of an account stands in no better position than the assignor, and that the Krasberg company was at all times indebted to the defendant for more money than the plaintiff claimed from the defendant. If the debtor in a chose in action promises the assignee to pay the debt to him, he cannot afterward avail himself of claims of set-off he may have against the assignor, as such a promise amounts to a waiver of any right of set-off he may have against the assignor. This is the rule as stated in 34 Cyc, 750. In Mowry v. Todd, 12 Mass. 281, it was held that the right of the defendant to set off any demand he had against the assignor of a note was effectually precluded by defendant's engagement to pay the plaintiff. To the same effect are Elliott v. Callan, 1 Penrose & Watts, 24 (Pa.); Gutchess v. Daniels, 49 N. Y. 605; National Bank of

is not enough upon this factor but it is evidence tending to confirm plaintiff's version of the oral agreement at its portion.

Plaintiff's claim is not based upon any tenancy by the sufferance of the trespassing occupant; its claim is based upon the agreement of the defendant, and the consideration for this was the surrender of the plaintiff to advance monies to the Krueger company so that defendant would receive the profits it wanted and at the same time reduce the indebtedness of the company to it. It was an arrangement for the benefit of all three parties. Defendant's agreement was clearly an agreement to pay for the crops patronized by it. The statute of frauds is not involved, for the defendant's promise was to pay its own obligation for merchandise delivered to it. Dartt v. Quinn, 89 Ill. 495. Defendant's point of novation is without merit. There was no agreement contemplating the release of the Krueger company from any of its existing indebtedness to the plaintiff.

Defendant says that it is entitled to set off against the plaintiff the indebtedness of the Krueger company to it on the theory that the negligence of an assignee stands in no better position than the assignor, and that the Krueger company was at all times indebted to the defendant for more money than the plaintiff claimed from the defendant. If the latter is a cause in action plaintiff matured to pay the debt he sue, no amount claimed until plaintiff of claims of set-off be had here adjusted the matter, we have a genuine moneys to a matter of such right of set-off to any case against the assignor. This is the rule as stated in 24 Cyc. 780. In Dartt v. Quinn, 89 Ill. 495, it was held that the right of the

Tacoma v. Puget Sound Lumber Co., 104 Wash. 363; King v. Fowler, 16 Mass. 397; Thompson v. Emery, 27 N. H. 269.

Complaint is made as to rulings of the trial court upon the evidence, but nothing of sufficient importance to require a reversal is presented.

The questions of fact involving the terms of the agreement were properly presented to the jury. The trial court would not have been justified in directing a verdict in favor of defendant.

Complaint is made of the instructions given to the jury. These were oral and the record fails to show that any specific objections were made upon the conclusion of the charge and before the jury retired, as required by rule 8 of the Municipal court.

The argument is made that the court erroneously failed to give certain written instructions at the request of defendant's counsel. Section 37 of the Municipal Court act, chapter 37, provides that in trial by jury in the Municipal court the charge may "in the discretion of the court be given orally or in writing." Morton v. Pusey, 237 Ill. 26; Nestler v. Pure Silk Hosiery Mills, 242 Ill. App. 151. The oral instructions given were substantially correct. They were one continuous and connected charge, and the jury was properly instructed with regard to the real questions at issue. It is not expected that oral instructions be wholly free from criticism in every particular. Zeman v. North American Union, 263 Ill. 304.

The amount of the verdict is criticised, but in what particulars it is erroneous is not made clear. We have already seen that the adjustments for defective motors were to be made by replacements by the Krasberg company without charge. Such items therefore have no place in the account. Without entering into a detailed statement of the account, we are of the opinion that the amount of the verdict was justified by the evidence.

Thomson v. Sturm Ruger Co., 104 Wash. 2d 1; 700 P.2d 1143 (1985).

10 Wash. 2d 2; Thompson v. Tacoma, 97 P. 2d. 98.

Concluding is push on to rolling at the right moment upon the evidence, but nothing of sufficient importance to require a retrial is presented.

The questions of fact involving the terms of the agreement are properly presented to the jury. The trial court did not have been justified in directing a verdict in favor of Defendant.

Complaint is made of the instructions given to the jury. These were drawn upon the conclusion of the charge and briefly the jury retired, as required by rule 4 of the Municipal Court. Instructions may be requested by either party and the Court is called upon to rule thereon. Section 22 of the Municipal Court Act, chapter 37, provides that in trial by jury in the Municipal Court the charge only "is the discretion of the court be given orally or in writing." Thomson v. Tacoma, 197 Fed. 98; Gardner v. Port Huron Traction Line, 142 Mich. 149. The oral instructions given were substantially correct. They were non-prejudicial and manifested knowledge, and the jury was properly instructed with regard to the real questions at issue. It is not required that instructions be wholly free from criticism in every particular. Thomson v. World Amusement Union, 843 Fed. 894.

The amount of the verdict is disputed, but in that particulars it is not made clear. It does appear that the Plaintiff submitted for deposit the amount which is to be made by Defendants if it is determined to be not more than. Such items of the account of the account, we are at the opinion that the testimony may be given to the account. Although counsel for Plaintiff contends that the verdict was influenced by passion and prejudice, we are of the opinion that the evidence

Defendant suggests that judgment was improperly entered against the Electric Clock Corporation instead of the Electric Clock Corporation of America, a Corporation. The defendant was originally sued by the prior name, but the pleadings were later amended before the trial to give the correct name of the defendant. The clerk of the Municipal court in writing the record made a mistake in stating the name of the defendant, but this was subsequently corrected by an order entered of record. The lower court has power to correct such clerical errors. Illinois Revised Statutes, 1931, (Cahill), chap. 7, sec. 6; Frink et al. v. Schroyer, 18 Ill. 416; Dunham v. The South Park Commissioners, 87 Ill. 185; Sinnock v. Harney, 250 Ill. App. 266.

No reversible error appears upon the record, and as the evidence justifies the verdict the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

Defendant contends that judgment was improperly entered against the Electric Clock Corporation instead of the Electric Clock Corporation of America, a corporation. The defendant was originally sued by the right name, but the pleadings were later amended before the trial to give the correct name of the defendant. The clerk of the municipal court in writing the record made a mistake in stating the name of the defendant, but this was subsequently corrected by an order entered of record. The lower court was bound to correct such clerical error. Illinois Revised Statutes, 1931, (Smith), chap. 7, sec. 8; Flynn et ux. v. Chesapeake, 14 Ill. 454; Chapman v. The County Clerk, 87 Ill. 169; Hooper v. Foster, 285 Ill. App. 466.

We investigate other objects upon the record, and we find evidence justifies the verdict the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

35773

In Re Estate of MARGARET B. BROOKS, Deceased, JOHN M. BANKER and LENA NASAL, Appellants,

vs.

EDWIN HAMILTON, Executor of the Estate of Margaret B. Brooks, Deceased, Appellee.

46 47

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

266 I.A. 602

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The question presented by this appeal involves the probate of the will of Margaret B. Brooks. February 18, 1931, the will was admitted to probate and letters testamentary were issued. John M. Banker and Lena Nasal, said to be heirs at law of Margaret B. Brooks, appealed to the Circuit court, and after hearing the order of the Probate court was affirmed. The contestants have appealed to this court.

The attack upon the Probate court order is based upon the assertion that the execution of the will was procured by fraud, compulsion and other improper conduct. The testimony of Henry M. Ashton, an attorney who drew the will for Mrs. Brooks, indicated that about a year before the will was made she suffered from a stroke of paralysis and had been in some institution, and that at the time she executed the will she could not talk fluently. The attesting witnesses testified that in her presence Mr. Ashton told them that she was making a will; that she was asked whether she wanted them to sign as witnesses and she replied "Yes"; that they believed Mrs. Brooks to be of sound and disposing mind and memory at the time she signed the will.

On behalf of the contestants it was offered to prove by other witnesses that Mrs. Brooks in 1919 suffered from a stroke of paralysis, that her speech was affected and she was not able to write her name; that she had been adjudged an insane person by the

38773

In Re Estate of EMMELINE E. BROOKE,
Deceased, JOSH K. PARKER and LUCY PARKER,
Appellants,

vs.

EDWIN BARTLETT, Executor of the Estate
of Margaret B. Brooke, Deceased,
Appellee.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

2661 I.A. 603

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

The question presented by this appeal involves the probate of the will of Margaret B. Brooke. February 18, 1913, the will was admitted to probate and letters testamentary were issued. John H. Barker and Lucy Parker, said to be heirs at law of Margaret B. Brooke, appealed to the Circuit court, and after hearing the order of the Probate court was affirmed. The contestants have appealed to this court.

The attack upon the Probate court order is based upon the assertion that the execution of the will was procured by fraud, compulsion and other improper conduct. The testimony of Henry K. Ashton, an attorney who drew the will for Mrs. Brooke, indicated that about a year before the will was made she suffered from a stroke of paralysis and had been in some institution, and that at the time she executed the will she could not talk fluently. The attesting witnesses testified that in her presence Mr. Ashton told them that she was making a will; that one had read another the second time to sign as witnesses and she replied "Yes"; that they believed Mrs. Brooke to be of sound and disposing mind and memory at the time she signed the will.

On behalf of the contestants it was offered to prove by other witnesses that Mrs. Brooke in 1912 suffered from a stroke of paralysis, that her speech was affected and she was not able to write for some; that she had been adjudged an insane person by the

County court of Kane county and confined to the Mercyville Sanitarium; that a conservator of her estate was appointed who had jurisdiction of the affairs of the testatrix until a year after the date of the purported will; that she was taken from the sanitarium about four months prior to the execution of the will by a writ of habeas corpus over the protest of the superintendent; that the representations made in the petition presented with the will to the effect that there were no heirs of the said testatrix and no property left by her, were false and fraudulent. Objections to this line of testimony were sustained.

We are of the opinion that the question presented has been definitely determined by our Supreme court against the position of the contestants. In Shepherd v. Yokum, 323 Ill. 328, it was held sufficient to admit the will to probate, that the writing was signed by the testator and attested in his presence by two credible witnesses who on their oaths testified that they were present and saw the testator sign, and that they believed him to be at such time of sound mind and memory; that the contestants of a will on an appeal to the Circuit court are confined to the testimony of the subscribing witnesses and to the cross-examination of the witnesses offered by the proponents. It was again so held in Robertson v. Yager, 327 Ill. 346.

Section 2, chapter 148, Wills, determines the proceedings sufficient to admit a will to record, with the proviso "that no proof of fraud, forgery, compulsion or other improper conduct be exhibited which, in the opinion of said County court, shall be deemed sufficient to invalidate or destroy the same." The proof offered by contestants tended to show the will was a forgery, or executed because of undue influence or the lack of mental capacity of testatrix to make a will.

In Oliver v. Oliver, 313 Ill. 612, it was held that the

Section 5, chapter 114, Hills, determines the proceedings of testators to make a will to record; with the proviso "that no deposition of issue, testimony, examination of other witnesses to be taken before the county court of Bare county and confined to the Hercbyille limits; that a commissioner of her county who had jurisdiction of the affairs of the testatrix until a year after the date of the purported will; that she was taken from the sanatorium about four months prior to the execution of the will by a writ of habeas corpus over the protest of the superintendent; that the improvements made in the petition pretending wit. The will is the effect that there were no debts of the said testatrix and no property left by her, were false and fraudulent. Objections to this line of testimony were sustained.

We are of the opinion that the question presented this honorable Court is definitely determined by our Supreme Court against the position of the contestants. In Shepherd v. Young, 201 Ill. 289, it was held sufficient to admit the will to probate, that the writing was signed by the testator and attested in his presence by two credible witnesses who on their oaths testified that they were friends and had reason and no doubt were familiar with the signature of the testator, although they believed him to be at such time of sound mind and memory; that two witnesses of a will on an appeal to the Circuit Court are sufficient as the testimony of the subscribing witnesses and in the examination of the witnesses stated to the Circuit Court was confined to the testimony of the subscribing witnesses and to the circumstances of the making of the instrument, and neither they nor the testator was examined as to the mental condition of the testatrix. It was also held by the Supreme Court in Hopkirk v. Young, 227 Ill. 616.

Section 5, chapter 114, Hills, determines the proceedings to admit a will to record, with the proviso "that no deposition of issue, testimony, examination of other witnesses to be taken before the county court of Bare county and confined to the Hercbyille limits; that a commissioner of her county who had jurisdiction of the affairs of the testatrix until a year after the date of the purported will; that she was taken from the sanatorium about four months prior to the execution of the will by a writ of habeas corpus over the protest of the superintendent; that the improvements made in the petition pretending wit. The will is the effect that there were no debts of the said testatrix and no property left by her, were false and fraudulent. Objections to this line of testimony were sustained.

We are of the opinion that the question presented this honorable Court is definitely determined by our Supreme Court against the position of the contestants. In Shepherd v. Young, 201 Ill. 289, it was held sufficient to admit the will to probate, that the writing was signed by the testator and attested in his presence by two credible witnesses who on their oaths testified that they were friends and had reason and no doubt were familiar with the signature of the testator, although they believed him to be at such time of sound mind and memory; that two witnesses of a will on an appeal to the Circuit Court are sufficient as the testimony of the subscribing witnesses and to the circumstances of the making of the instrument, and neither they nor the testator was examined as to the mental condition of the testatrix. It was also held by the Supreme Court in Hopkirk v. Young, 227 Ill. 616.

fraud permitted to be proven to invalidate a will is not intended to embrace the testamentary capacity of the testator, but that the fraud must be such conduct as a trick or device by which a person is induced to sign a paper as something else, or, the alteration of the will after it is signed or the substitution of another paper for part of the will after it has been signed, and matters of like character; that the Circuit court should not entertain any evidence on the question of whether or not the will is a forgery or executed because of undue influence or of the mental capacity of the testator to make a will. Stuke v. Glaser, 233 Ill. 316.

These cases lead to the conclusion that the only method of contesting a will under the circumstances presented is stated in section 7 of the Statute of Wills, ch. 148, (Cahill) - that is, by filing a bill in chancery. Shepherd v. Yokum, supra.

However desirable it might be to have the validity of a will determined in one proceeding, yet the law of this State is otherwise.

The judgment of the Circuit court affirming the order of the Probate court was proper and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

D'Cowper, P. J., and Pentwart, J., dowager.

Facsimile.

The judgment debtor was dropped out of it in April.

The defendant of the Circuit Court attorney who drew it

attorney.

Counsel described it might be as have the validity of a

will delivered to the deceased, but the law of duly state is

by filing a bill in Chancery. Gilbert v. Tyler, supra.

In section 2 of the Statute of Wills, ec. 128, (Cantty) - that is,

of contesting a will under the civil-stones presented in stated

for to make a will. Gilbe v. Glover, 172 Ill. 314.

There seems less to the resolution that one duly mature

on the question of whether or not the will is a forged or executed

because of undue influence or of the mental capacity of the testa-

operator; that the Circuit Court should not interfere and estimate

for part of the will after it has been signed, as evidence of like

the will after it is signed or the obliteration of another paper

to induced to sign a paper by accounting else, or, the alteration of

fraud must be such conduct as a tries or device by which a person

to enforce the testamentary capacity of the testator, but that the

fraud persists to be proven by intermediate a will is not entered

35785
LUCILLE ROVAS,
Appellee,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

266 I.A. 602

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover on an insurance policy issued by defendant, and upon trial by the court had judgment for $966, from which defendant appeals. Defendant had already paid the amount provided for in the policy to an aunt of the insured. Plaintiff claims that as she is the beneficiary named in the policy the money should have been paid to her.

In the policy, dated February 27, 1929, plaintiff was named as the beneficiary. Defendant says that this beneficiary was changed to Ida Michalak, an aunt of the insured, under a provision in the policy as follows:

"Change of Beneficiary. With the consent of the Company, the Insured, if of lawful age, may from time to time change the beneficiary by request to the Home Office upon the Company's prescribed form accompanied by this policy, such change to take effect only upon endorsement hereon by the Company."

Endorsed on the policy by the Secretary June 21, 1929, is the following:

"All prior designations having been revoked, Ida Michalak, aunt, has been designated as beneficiary, subject to the right of the insured to make further designations as provided in the Policy, it being agreed that no such designation shall take effect until endorsed hereon by the President or Secretary.

Charles A. Diman,
Secretary.

Boston, June 21, 1929."

Upon the trial plaintiff introduced the policy, except the endorsement. The court permitted it in evidence with this exception, defendant objecting on the ground that the endorsement was part of the policy. The trial court should have admitted the entire document, including the endorsement which was made by the defendant

266 I.V. 603

35708

LUCILLE BOVAS,

Appellee,

vs.

THE JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY, a Corporation,
Appellant.

ON, JUSTICE MOSKOSKY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover on an insurance policy issued by defendant, and upon trial by the court and judgment for $600, from which defendant appeals. Defendant had already paid the amount provided for in the policy to an agent of the insured. Plaintiff claims that as the beneficiary named in the policy the money should have been paid to her.

In the policy, dated February 17, 1928, Dorothy was named as the beneficiary. Paragraph eight (8) of the policy was changed to read Richard, on page 2 of the insured, under a provision in the policy as follows:

"Change of beneficiary. With the consent of the Company, the insured, if of legal age, may from time to time change the beneficiary by request to the home office (Life Insurance Department) in such form as may be prescribed by this policy, and effective to take all such action from the Company. Upon such change all rights of the former beneficiary cease."

Indorsed on the policy by the Secretary June 27, 1928, is the following:

"All prior beneficiaries having been revoked, the right of the insured to make further beneficiary designations as provided in the policy, it being agreed that no such designation shall take effect until endorsed thereon by the President or Secretary.
Charles A. Dimon,
Secretary.
Boston, June 27, 1928."

Upon the trial plaintiff introduces the policy, showing the endorsement. The court permitted it to be received with this explanation, defendant objecting on the ground that the instrument was part of the policy. The trial court should have admitted the notice

and became a part of the contract of insurance.

Plaintiff's point seems to be that defendant did not show that the change of beneficiary was in pursuance to a request of the insured made upon "the Company's prescribed form." This condition was for the protection of the company and if it chose to waive a request in writing it could so do. In Freund v. Freund, 218 Ill. 189, cited by plaintiff, there was no endorsement on the policy. It was held that even where a request in writing had been made for a change in beneficiary, the change did not take effect until endorsed on the policy. That is manifestly not this case. Here the endorsement was made.

Even if there might be some question as to the validity of this endorsement, under further provisions of the policy (called a "facility of payment" provision) it is clear that plaintiff is not entitled to recover, as follows:

"The Company may make any payment or grant any nonforfeiture benefit provided herein either to the beneficiary above named, if living, or to such other living beneficiary as may be duly and finally designated, and recognized by endorsement hereon, or to the Executor or Administrator of said Insured or to any relative by blood or connection by marriage, or to any person appearing to the Company to be equitably entitled thereto by reason of having incurred expense in any way on behalf of the Insured for burial or for any other purpose; and the receipt of any such payee shall be conclusive evidence that payment has been made to the person or persons entitled thereto and that all claims under this policy have been fully satisfied.***"

Ida Michalak, to whom the proceeds of the policy was paid, was an aunt of the insured; hence she would come under the provision just quoted providing for payment "to any relative by blood or connection by marriage."

She also paid the funeral expenses of the insured, and thus became entitled to payment under that part of the provision above quoted with reference to any person having incurred such expenses on behalf of the insured. In Bishop v. Prudential Ins. Co., 217 Ill. App. 112, where such a clause was given thorough consideration,

and became a part of the contract of insurance.

Plaintiff's point seems to be that defendant did not make that the change of beneficiary was in pursuance to a request of the insured made upon "the Company's prescribed form." This condition was for the protection of the company and it is above to waive a request in writing if it chose to do. In Krenzer v. Krenzer, 218 Ill. 108, cited by plaintiff, there was no endorsement on the policy. It was held that even where a request in writing had been made for a change in beneficiary, the change did not take effect until endorsed on the policy. That is manifestly not this case. Here the endorsement was made.

Even if there might be some question as to the validity of this endorsement, under former provisions of the policy (voided a "facility of payment" provision) it is clear that plaintiff is not entitled to recover, as follows:

> "The Company may make any payment or grant any nonforfeiture benefit provided herein either to the beneficiary above named, if living, or to such other living beneficiary as may be duly and finally designated, not recognized by endorsement hereon, or to the executor or Administrator of said insured or to any relative by blood or connection by marriage, or to any person appearing to the Company to be equitably entitled thereto by reason of having incurred expense in any way on behalf of the insured or having rendered services which, in the Company's judgment, were equitable and proper; and the receipt of any such person shall be conclusive evidence that payment has been made to the person or persons entitled thereto and shall fully release and discharge the Company from all claims under this policy have been fully satisfied."

Its attorney, claiming the proceeds of the policy was paid, also just quoted providing for payment "to any relative by blood or connection by marriage."

The only real Company exception of the insured, and thus became entitled to payment under that part of the provision above quoted with reference to any person having incurred such expense on behalf of the insured. In Bishop v. Burlington Ins. Co., 217 Ill. App. 112, where such a change was given thorough consideration,

it was held that it was not againstpublic policy and should be liberally construed, to the end that the insurance company might be protected in making a prompt payment without the expense of administration proceedings. In McDaniels v. Western & Southern Life Ins. Co., 332 Ill. 603, the court sustained such a clause, saying that where the company has exercised the option provided for in the clause with reference to payment, "such exercise will be a complete defense under the terms of the policy." To the same effect are Thomas v. Prudential Ins. Co., 148 Pa. St. 594; Bradley v. Prudential Ins.Co., 187 Mass. 226; Prudential Ins. Co. v. Howell, 289 Pac. 734; Whitaker v. Metropolitan Life Ins. Co., 259 Ill. App. 668. Plaintiff's counsel attempts to distinguish these cases from the case at bar because, he says, that in none of them did the policy designate a specific beneficiary. Even so, the cases cited are in point as sustaining the essential principle that under such a clause the insurance company has an option to pay the insurance to any of the persons named in the clause, provided, of course, that such payment was made in good faith.

Plaintiff also attempts to construe this clause as providing for payments to others than the beneficiary named only in case the first beneficiary has not survived the insured. It is argued this is the meaning of the words, "either to the beneficiary above named, if living, or to such other living beneficiary as may be duly and finally designated." For two reasons this construction cannot be adopted: (1) The language itself contemplates that payment may be made to others than the first beneficiary named, even though she be living. The words, "or to such other living beneficiary" imply that the first beneficiary might still be living. (2) The construction contended for would contradict the clause of the policy giving the insured the right to change the beneficiary without regard to whether the first named beneficiary was living or otherwise.

it was held that it was not discriminatory policy and should be
allowed to remain in effect. In the end that insurance company might be
protected in meeting a claim for payment without the expense of expensive
litigation, considering the extra hazardous character of the policy
insured. The words, "or to whom policy may be issued," might
seem to authorize them to refuse to issue a policy to any person
named in the clause, therefore, of course, that such payment
was made in good faith.

Plaintiff also attempts to construe this clause as providing
for payments to others than the beneficiary named only in case the
first beneficiary has not survived the insured. It is argued this
is the meaning of the words, relative to the beneficiary above named,
if living, or to such other living beneficiary as may be duly and
lawfully designated." May one reasonably construe (1) the
adoption: (2) the surrender life-of beneficiaries that payments may be
made to whom they may be allotted by insured, even though she be
living. The words, "or to whom policy may lawfully" imply
that the first beneficiary might exist or living. (3) The con-
struction contended for would substantially destroy the policy
given the insured the right to change the beneficiary without
limitation. In Bohnstedt v. Eastern & Southern Life Ins.
Co., 215 Ill. 603, the court construed such a clause, saying that
under the second par construed the option reserved for in the clause
with reference to payment, "must exercise only by a complete delivery
under the terms of the policy." In the case at bar Thomas E.
Fraudulent Ins. Co., 149 Ga. 44; Fidelity v. Prudential Ins. Co.,
187 Mass. 534; Continental Ins. Co. v. Howell, 108 Tex. 244; Metropolitan
v. Metropolitan Life Ins. Co., 228 Ill. App. 548. Plaintiff's
counsel attempts to distinguish these cases from the case at bar
because, he says, that in none of them did the policy contain a
specific beneficiary. Even so, the cases cited are in point as
establishing the settled principle that under such a clause the in-
surance company has a right to pay the insurance to any of the
persons named in the clause, therefore, of course, that such payment
was made in good faith.

Defendant acted in good faith in paying the insurance money to the aunt of the insured, who had paid the funeral expenses, and under the clause under consideration it is provided that this "shall be conclusive evidence that payment has been made to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

For the reasons indicated we hold that the trial court erroneously entered judgment for the plaintiff. This is therefore reversed, and as plaintiff is not entitled to recover, judgment will be entered in this court for the defendant.

REVERSED AND JUDGMENT HERE.

O'Connor, P. J., and Matchett, J., concur.

Defendant relied in good faith to pay the insurance money to the wife of the insured, the Red Wolf Oil Company, and under the clause under consideration it is provided that this shall be conclusive evidence that payment has been made to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied.

For the reasons indicated we hold that the trial court erroneously entered judgment for the plaintiff. This is therefore reversed, and as plaintiff is not entitled to recover, judgment will be entered in this court for the defendant.

REVERSED AND JUDGMENT GIVEN.

O'Connor, P. J., and Lockwood, J., concur.

35670

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L. BUSH ROSSITER,
Defendant in Error,

vs.

F. E. BRIGHTMAN,
Plaintiff in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

266 I.A. 602

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this writ of error Brightman, defendant in the trial court, seeks to reverse a judgment in favor of plaintiff in the sum of $16,902.17. The judgment was entered upon the verdict of the jury in an action in assumpsit, after motions for a new trial and in arrest had been overruled.

The declaration in its different counts in substance charged that defendant sold to plaintiff a two and a half per cent interest in the Oldham Gold Mining Syndicate for $13,000, defendant agreeing as a part of that transaction that he would hold plaintiff harmless for a reasonable period of time against any loss which might be incurred by reason of this purchase, and that he would repurchase the same at the price for which it was sold with interest at 6%; that on October 8, 1926, defendant put the agreement between the parties in the form of a letter of that date, as follows:

"At the time of the organization of the Oldham Gold Mining Syndicate you became a member thereof.

Subsequently, and since this organization, I have turned over to you two and one-half per cent interest in said Syndicate, being a part of my interest therein, and you have paid me on account thereof Twelve Thousand Five Hundred Dollars ($12,500) and have agreed to pay me the further sum of Five Hundred Dollars ($500), making a total of Thirteen Thousand Dollars ($13,000) in all.

I have agreed with you that I will save you harmless in this transaction over a reasonable period of time. In other words, I have agreed to take back this two and one-half per cent interest above mentioned and repay you the amounts paid me, together with six per cent (6%) interest thereon, if you should so desire.

It is our understanding, however, that at such time as you have a bona fide opportunity to dispose of said interest in the Oldham Gold Mining Syndicate at a substantial profit that my liability under this agreement shall cease.

At the present time, it is contemplated that a corporation shall be organized at once to take over the affairs of the Syndicate.

J. Doe Plaintiff,

Defendant in Error,

vs.

R. S. Defendant,

Plaintiff in Error.

No. 12345

Error to District Court

of Lone County.

Opinion by Judge Thomas.

The facts are set forth in the opinion.

The plaintiff in error, defendant in the trial court, seeks to reverse a judgment in favor of plaintiff in the sum of $10,000.00. The judgment was entered upon the verdict of a jury in an action in ejectment, after motions for a new trial and in arrest had been overruled.

The complaint in its allegations sounds in substance charged that defendant held in possession a one and a half per cent interest in the Gibbon Gold Mining Syndicate for $15,000, defendant represented as a fact of less importance that he would defend plaintiff's patentee for a reasonable period of time against any loss which might be incurred by reason of this purchase, but that he would repurchase the same at the price for which it was sold; interest at 6%; that on October 1, 1910, defendant and the agreement between the parties in the form of a letter of that date, as follows:

"At the time of the organization of the Gibbon Gold Mining Syndicate you became a member thereof.

Subsequently, and since organization, I have loaned over to you two one-half per cent interests in said Syndicate, being a part of my interest therein, and you have paid me my account therefor (which thousand five hundred Dollars [$1,500]) and have entered to pay the further sum of five hundred Dollars ($500), making a total of fifteen Thousand Dollars ($15,000) in all.

I have agreed with you that I will have you patented to this transaction over a reasonable period of time. In other words, I agree to pay to you the further sum of five hundred Dollars ($500) in addition to the sum of fifteen Thousand Dollars ($15,000) and have entered to take back the one-half per cent interest above mentioned and fund you the amounts paid me, together with six per cent (6%) interest thereon, if you should so desire.

It is our understanding, however, that at such time as you have a fund sufficient to dispose of said interest in the Gibbon Gold Mining Syndicate at a substantial profit that you will pay me my principal and interest, and I agree to assign to you my interest in said Syndicate.

If the above accords with your understanding of the matter, please sign the duplicate hereof in the space provided therefor and return the same to me."

Plaintiff in error contends that the letter is ambiguous and uncertain, and that it contemplated and required the performance of some act by plaintiff in error before defendant could be liable thereon, and that no such act was performed by plaintiff in error. Plaintiff in error also contends that the letter is void for the reason that it is a contract for the sale of corporate stock, and that the same is void because it was not executed in accordance with the provisions of section 1 of chapter 74 of the Laws of 1907, relating to the sale of corporate stock.

This agreement applies to the interests that you may receive in the corporation in exchange for your interests in the Syndicate.

Pending disposing of my liability under this memorandum, you are to retain in your possession policy of life insurance heretofore delivered and assigned to you as security. You have no interest in this policy of life insurance other than as security for the guarantee, evidenced by this letter. In the event of my death you would then have to elect whether you would exercise your privilege under this guarantee to have your money returned to you with interest herein provided, in which event you would surrender the two and one-half per cent interest in the Syndicate or in the corporation as the case might then be, and receive your money, or would waive the guarantee and surrender the insurance to my estate."

The declaration averred that thereafter on October 28, 1926, plaintiff paid to defendant the further sum of $500 as provided in this agreement; that on November 5, 1926, the Acadia Gold Mines, Ltd., a corporation, was organized under the laws of the Province of Nova Scotia, Canada, and the said corporation took over the business, affairs, assets, property and liabilities of the Oldham Gold Mining Syndicate; that in March, 1929, the Acadia Gold Mines, Ltd., lost its property and assets, has ceased to do business and since that time has not done any business or been possessed of any assets, and that it is to all intents and purposes a defunct corporation. The declaration also averred that plaintiff at no time had a bona fide opportunity to dispose of the two and a half per cent interest in the Oldham Gold Mining Syndicate at a profit, and that the said interest is now and since March, 1929, has been worthless and of no value whatever; that in March, 1928, plaintiff requested that defendant take back from plaintiff the interest thus purchased and tendered to defendant his interest in said Syndicate and said Corporation and requested the return of the $13,000, but that defendant refused to take the same back and rejected the tender of plaintiff; that on frequent occasions since that date plaintiff has likewise offered his interest in the Syndicate and the Corporation and demanded that defendant comply with the terms of the contract, which defendant refused to do.

Defendant filed a plea of non assumpsit with notice of special

defenses. Evidence in support of the declaration and the pleas was offered by the parties, and at the close of all the evidence defendant made a motion for an instructed verdict which was denied. The cause was submitted to a jury and verdict returned by them in favor of plaintiff, as heretofore stated.

Defendant contends in the first place that the court erred in denying its motion for an instructed verdict at the close of the evidence, and it is urged that this instruction should have been given upon the theory that while the declaration alleged a tender by plaintiff to defendant of the interest purchased, plaintiff upon the trial gave only evidence tending to show an excuse for failure to make such tender. We are not impressed by the contention. The facts upon which it is based if true would at most amount to no more than a variance, and defendant did not object to the proof offered on that ground and thereby waived it. Osgood v. Skinner, 211 Ill. 229; Pickett Co. v. Kuchan, 323 Ill. 138; Brodsky v. Frank, 342 Ill. 110.

Moreover, there was proof tending to show that at the time plaintiff made his demands upon defendant, the physical evidences of his interest in the Syndicate and the Corporation were in the possession of defendant, and, of course, it would be quite unnecessary for plaintiff to return papers of which defendant already held possession. At any rate, we think the evidence tends to show, as the jury must have found, that the interest in the Syndicate, as well as in the mining corporation, was at all times practically worthless, and there is authority to the effect that an offer to return is not necessary in such case. Mitchell v. Mitchell, 263 Ill., 165.

Again, defendant contends that the court should have held as a matter of law that plaintiff waived his right to enforce defendant's guaranty to hold him harmless, by reason of failure to make demand within a reasonable time as provided by the agreement.

The evidence bearing on this point is conflicting in certain respects, but that given by plaintiff (and which the jury apparently believed) is to the effect that the oral promise to hold plaintiff harmless was made in April, 1926. It is undisputed that the writing was delivered by defendant on October 8, 1926. The evidence also shows that at this time and for quite a period of time thereafter the parties were personal friends; that defendant acted as the attorney for plaintiff, and that defendant had plaintiff's confidence to a great degree. Defendant was also attorney for the Syndicate holding the mining property and for the Corporation afterward organized to exploit it. He was also secretary, stockholder and director of the mining corporation formed to take over the property of the Syndicate in December, 1926. The evidence offered by plaintiff is to the effect that in March, 1928, 15 months after the organization of this corporation, plaintiff demanded that defendant comply with the agreement to hold plaintiff harmless, and that at defendant's request plaintiff forebore to press the matter further at that time. There was also evidence tending to show further demands in March and October, 1929, and in January, 1930. Defendant says that the first demand by plaintiff was that made in January, 1930, but it was for the jury to pass upon the credibility of the witnesses. The record shows that this suit was begun by plaintiff May 7, 1930. In view of all the facts and circumstances and the conflict in the evidence, it must be held, we think, that the question of what was reasonable time was one of fact for the jury. This seems to be the general rule where the evidence is conflicting. 4 Page on Contracts, 3650, 3651; Magee v. Carmack, 13 Ill. 289.

Defendant has cited on this point quite a number of authorities, most of which we think are easily distinguishable. One of these is Thompson on the Law on Trials, vol. 2, sec. 1542, p. 1129,

where the author states the general rule applicable to a case in which the vendee of a chattel claims a breach of warranty and rescinds the contract. The distinction is obvious. Defendant also cites Waterman v. Banks, 144 U. S. 394 - a case which involved a contract whereby one of the parties had agreed to make a deed to certain mining property within 12 months; and Williston on Contracts, vol. 2, sec. 854, p. 1635, where the general rule with reference to the rescission of a contract for a breach of warranty is stated. He also cites Larson v. Jordan, 56 Ill. 204, where a proposition made to sell at any time up to May 1st of the same year was held to be without any consideration. Ide v. Brody, 156 Ill. App. 479, is another case cited in which a defendant held the goods which he had purchased for nine months without returning them, and then undertook to rescind, and it was held that he might not do so. Hoffman v. Gillett, 250 Ill. App. 492, also cited, is a case where there was an agreement that stock sold should be listed upon the exchange within ninety days or the sale might be rescinded and the purchaser waited more than five years, and the promise was held to be barred by the statute of limitations. Burwash v. Ballou, 230 Ill. 34, involved the sale of mining stock which was purchased for speculation, and it was held that the party desiring to rescind must act promptly and that this general rule was specially applicable to sales of mining stocks.

All of these cases are easily distinguishable. The writing here shows in substance a promise of guaranty. There were two provisions in it evidently intended for the protection of defendant. One was that the guaranty was limited to a reasonable period of time and the other was that when plaintiff should have a bona fide opportunity to dispose of his interest at a substantial profit the liability of defendant should cease. There is no evidence tending to show that any such opportunity ever presented itself. Indeed,

to show that the chancellor's real preference lay elsewhere. Indeed, the possibility of deliberate ambiguity was present in the very nature of the trial. Whether or not the jury was told that it was to be a test case in the sense that the decision in it would be binding for the disposition of other cases was left entirely to their discretion

we think the fair inference from all the testimony is that this mining property was at all times worthless, and we think it not unreasonable that defendant should be held by his written promise within the period fixed by the statute of limitations for bringing action upon an instrument of this kind. There are cases which we think in effect so hold. Roush v. Ill. Oil Co., 180 Ill. App. 346; Katt v. Chapman, 248 Ill. App. 12; Beverly v. Richards, 238 N. W. 270; Poole v. Corker, 15 Ga. App. 622, 83 S. E. 1101.

Defendant further contends that the verdict of the jury is manifestly against the weight of the evidence and the trial court should have granted a new trial for that reason, and cites Belden v. Innis, 84 Ill. 78; Donelson v. East St. L. & Suburban Ry. Co., 235 Ill. 625, and Cady v. Grand Trunk Western Ry. Co., 251 Ill.App. 513. There is no doubt of the rule of law applicable or of the duty of the trial court and of this court under such circumstances. It would unduly extend this opinion to discuss all the evidence in detail. Some of it is uncontradicted, much of it is documentary, and as to many of the facts there is a direct conflict, defendant testifying one way and plaintiff the other. We have examined the record thoroughly and are not able to say that the verdict is contrary to the weight of the evidence. Indeed, we are disposed to agree that the verdict of the jury is proper and just and warranted by the evidence.

The next contention of defendant is that his promise was based on a past consideration and that no action could be sustained on it for that reason. Defendant recites quite at length testimony tending to show that certain sums of money were advanced by plaintiff to defendant prior to October 3, 1926; that these were in the nature of loans; that plaintiff purchased an interest in the mining property in July, 1926, for $43,000, and that the money lent by plaintiff to defendant was by agreement thereafter applied on the purchase price,

we think the fair inference from all the testimony is that this mining property was at all times worthless, and we think it not unreasonable that defendant would be held by his written promise within the period fixed by the statute of limitations for bringing action upon an instrument of this kind. There are cases which we think in effect so hold. Ungr v. Ill. Oil Co., 180 Ill. App. 346; Kurz v. Chapman, 248 Ill. App. 14; Beverly v. Sibbering, 239 S. W. 979; Pauls v. Carter, 13 Ga. App. 597, 80 S. E. 1101.

Defendant further contends that the verdict of the jury is manifestly against the weight of the evidence and the trial court should have granted a new trial for that reason, and cites Bolton v. Lundin, 84 Ill. 71; Donelson v. East St. L. & Suburban Ry. Co., 235 Ill. 625, and Sams v. Grand Trunk Western Ry. Co., 241 Ill.App. 513. There is no doubt of the rule of law applicable or of the duty of the trial court and of this court under such circumstances. It would unduly extend this opinion to discuss all the evidence in detail. Some of it is uncontradicted, much of it is documentary, and as to many of the facts there is a direct conflict, defendant testifying one way and plaintiff the other. We have examined the record thoroughly and are not able to say that the verdict is contrary to the weight of the evidence. Indeed, we are disposed to think that the verdict of the jury is proper and just and warranted by the evidence.

The next contention of defendant is that his promise was based on a past consideration and that no action could be sustained on it for that reason. Defendant recites quite at length testimony tending to show that certain sums of money were advanced by plaintiff to defendant prior to October 8, 1925; that these were in the nature of loans; that plaintiff purchased an interest in the mining property in July, 1926, for $25,000, and that the money lent by plaintiff to defendant was by agreement thereafter applied on the purchase price,

as was $500 later paid to defendant by plaintiff on October 28th. Defendant undertakes to entirely separate and disconnect these several transactions and upon that theory urges that there was no consideration for defendant's promise to repurchase the interest sold, citing 13 Corpus Juris, sec. 220, p. 359, to the proposition that a past consideration will not sustain an option contract. Defendant's theory is based upon testimony given by defendant which was as a matter of fact stricken from the record. The record shows in substance a conditional sale of an interest in this mining property with an option in the purchaser to rescind it and with a mutual promise of the seller to repurchase. These mutual promises constitute a sufficient consideration. 6 Fletcher Cyc. Corp., p. 6583; Kincaid v. Overshiner, 171 Ill. App. 37.

Defendant also contends that the parties by their acts treated the promise of defendant to plaintiff as terminated and again argues the question of demand which we have already considered. The writing of October 8, 1926, mentions a policy of insurance which was deposited with plaintiff pursuant to its terms. This policy at the request of defendant was returned to him some time in the spring of 1927. It is now urged (and defendant and one of his employees gave evidence tending to show) that at the time the policy was returned there was a conversation indicating that the promise contained in the writing to repurchase was no longer regarded by the parties as binding. We have not been impressed by this evidence. It seems very improbable under all the circumstances, and at any rate its weight was for the consideration of the jurors, who apparently gave little credence to it. The insurance policy was in the nature of collateral. The surrender of that collateral to the debtor at his request without the surrender of the primary obligation to which it was collateral would not necessarily operate to discharge the obligation.

It is next contended that the court erred in giving to the

jury instruction No. 14 at the request of plaintiff. This instruction is as follows:

"The Court instructs the jury that, if you find from the evidence that the defendant, F. E. Brightman, signed and delivered to the plaintiff the document, dated October 8, 1926, and that before the delivery of the document the plaintiff had paid to defendant the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) for a two and one-half per cent interest in the Oldham Gold Mining Syndicate and that after the delivery of said document, dated October 8, 1926, the plaintiff paid the defendant an additional Five Hundred Dollars ($500.00), making a total of Thirteen Thousand Dollars ($13,000.00) for said two and one-half per cent interest in said Syndicate, and if you further find from the evidence that the plaintiff at no time had a bona fide opportunity to dispose of the said two and one-half per cent interest in the Oldham Gold Mining Syndicate, or any part of said interest, or of his interest in any stock received by him in exchange for said two and one-half per cent interest in said Oldham Gold Mining Syndicate, or any part of said stock, at a substantial profit, and if you further find from the evidence that within a reasonable time after October 8, 1926, under all the facts and circumstances shown in the evidence, the plaintiff requested and demanded of the defendant that the defendant take back said two and one-half per cent interest in said Syndicate, or the stock which was given the plaintiff in exchange for said interest, and the plaintiff demanded and requested of the defendant that he return and pay back to the plaintiff the sum of Thirteen Thousand Dollars ($13,000.00) with interest, and that the defendant refused to take back from the plaintiff said interest in said Syndicate and said stock given the plaintiff in exchange therefor and refused to pay or turn back to plaintiff the sum of Thirteen Thousand Dollars ($13,000.00), or any part thereof, and if you further find from the evidence that the plaintiff has never received from the defendant any part of said Thirteen Thousand Dollars ($13,000.00) and that the plaintiff has never waived his right to said Thirteen Thousand Dollars ($13,000.00); then you may find the issues in favor of the plaintiff for the sum of Thirteen Thousand Dollars ($13,000.00) plus interest thereon at six per cent from October 8, 1926, to date."

Defendant urges that the instruction is erroneous in that it sets out facts which are not a part of the record; that it is vague, ambiguous and of such length that it tended to mislead instead of enlighten the jury; that the use of the words, "The document dated October 8, 1926," is not a sufficient description of that document, and that it contained legal phrases which were not explained to the jury. There was only one document in evidence which was dated October 8, 1926. Moreover, the document was described in the same way in one of the instructions given at the request of defendant. We do not find facts stated therein which are not a part of the record, nor do we regard the instruction as vague and ambiguous. If there were

jury instruction do. In all the respect of plaintiff. This instruction is as follows:

"The Court instructs the jury that, if you find from the evidence that the defendant, [illegible] entered into delivered to the plaintiff the document, dated October 3, 1938, and that before the delivery of the instrument the plaintiff had paid to defendant the sum of twelve thousand [illegible] for a one and one-half per cent interest in the [illegible] Petition and that after the delivery of said document, dated October 3, 1938, the plaintiff paid the defendant an additional five thousand dollars ($5000.00), making a total of fifteen thousand dollars ($15,000.00) for said two and one-half per cent interest in said [illegible], and if you further find from the evidence that at the time said [illegible] was a done like operation, it was engaged in the [illegible] business, or any part of said business, or if this interest in any wise received by him in exchange for said two and one-half per cent interest in said [illegible] Gold Mining Syndicate, or any part of [illegible], and if you further find from the evidence that within a reasonable time after October 3, 1938, under all the circumstances shown in the evidence, the plaintiff requested and demanded of the defendant that the defendant make good unto said plaintiff per cent interest in said Syndicate, or the stock which was given the plaintiff in exchange for said interest, and the plaintiff demanded and requested at said delivery time he return and pay back to the plaintiff the sum of fifteen thousand dollars ($15,000.00), or any part thereof, and that the defendant refused to take back from the plaintiff said interest, and that the plaintiff is now [illegible] and has never waived his right to said Fifteen Thousand Dollars ($15,000.00); then you may find the issues in favor of the plaintiff for the sum of fifteen thousand dollars ($15,000.00) with interest thereon at six per cent from October 3, 1938, to date."

Defendant urges that the instruction is erroneous in that it [illegible] out there exists only one document in evidence which is dated October 3, 1938. However, the document was discussed in the same way in one of the instructions given at the request of defendant. We do not find facts which thereto which are not a part of the record, nor do we regard the instruction as vague and ambiguous. It bears rate

phrases which needed explanation in the opinion of defendant, it was for him to submit proper instructions explaining them. There was no reversible error in the giving of this instruction.

It is complained that the court erred in refusing to give at the request of defendant instruction No. 18, which without directing a verdict points out ten propositions supposed to be favorable to defendant. Some of the propositions assume facts not justified by the record, and we think the giving of the instruction could have served no useful purpose.

Complaint is also made that the court erred in refusing to give instruction No. 20 requested by defendant, which in substance told the jury that plaintiff could not recover unless he had made a demand for payment within a reasonable time and offered to return "the Syndicate interest or stock interest which he purchased from the defendant." As a matter of fact, the stock in the corporation was not purchased from defendant. The interest in the Syndicate was purchased and the stock was later issued in lieu thereof. Moreover, other instructions were given on this point which correctly stated the law.

It is also contended that the verdict of the jury should have been set aside because the jury disregarded an instruction given by the court to the effect that if the jury should find from the evidence that plaintiff sold or disposed of part of the stock he held in the Acadia Gold Mines, Ltd., so that he could not return to defendant the full stock interest he had purchased, then such sale or disposal of stock amounted in law to a waiver of plaintiff's rights, if any, under the alleged contract of October 8, 1926. There was no evidence in the record tending to show that plaintiff had sold or disposed of any part of his stock in the way indicated. There was admitted over the objection of plaintiff (and, we think, improperly) an exhibit numbered 5, which indicated an

agreement to donate 20,000 shares to the treasurer of the corporation, but the undisputed evidence shows that the agreement never went into effect and that the whole deal to which it related was abandoned. We think the court erred in giving the instruction and that the jury might have disregarded it without error.

Defendant next contends that the court erred in admitting incompetent and irrelevant evidence offered in behalf of plaintiff. Much more time was spent in trying the case than should have been given to it, but we do not think there was any reversible error in the admission of evidence.

Defendant next contends that the judgment should be reversed because the attorney for plaintiff improperly appealed to the sympathy and emotions of the jury. We have given careful consideration to the argument of the attorney for plaintiff as it appears in the abstract. It seems to have been in effect urged that as defendant was a lawyer of long experience and plaintiff was his client and social friend and apparently had confidence in him, defendant should have been slow to dispose of what appears to have been a worthless interest in a far off mining property to plaintiff. It clearly appears from the record that to plaintiff (a friend and client) defendant sold an interest in the Syndicate and Corporation for which he was also an attorney and that he profited thereby practically to the extent of the money which was obtained from his client. We doubt very much whether the eloquence of distinguished counsel could have stirred the passions of the jury more than the simple recital of the facts. It was apparent to the jury, as it is to anyone reading the record, that plaintiff was separated from his money by his lawyer and friend whom he trusted. Defendant needed money, and he held before plaintiff the hope of large profits which the record indicates he had no just reason to believe would ever accrue.

We think that another jury would not be persuaded to return

a different verdict and that substantial justice has been done; and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McCurely, J., concur.

a different verdict and that substantial justice was done;
and the judgment is affirmed.

AFFIRMED.

O'Connor, C. J., and Doherty, J., concur.

35729

EGBERT HISERT, Administrator of the Estate of Glen Hisert, Deceased, Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY et al., Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

49

266 I.A. 602

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries, upon trial by jury a verdict was returned against defendants for $3500, upon which the court, overruling motions for a new trial and in arrest, entered judgment, which defendants seek by this appeal to reverse.

The declaration in three counts charged negligence by defendants while operating one of their street cars on October 4, 1929, on 119th street in Chicago. The several counts charged negligence in the maintenance, operation and control of the car, in failing to give warning by bell or horn and in using the public highway for storage of cars without a license and without posting a watchman. Defendants pleaded the general issue. After the verdict and before judgment, plaintiff died, his administrator was substituted and judgment entered in his favor.

Defendants rely most upon their contention that the evidence discloses that plaintiff was not free from contributory negligence and argue that upon the undisputed evidence and as a matter of law he was guilty of such negligence, and that being guilty of contributory negligence as a matter of law the judgment should be reversed without remanding the cause. However, it is further contended that at any rate the preponderance of evidence indicates that plaintiff was guilty of contributory negligence as a matter of fact, and for that reason the judgment should be reversed and the cause remanded for a new trial. It

3249

ROBERT MINOT, Administrator of
the Estate of Glen Minot, Deceased,
Appellee,

vs.

CHICAGO GULF RAILWAY COMPANY et al.,
Appellants.

APPEAL FROM SUPERIOR COURT OF
LAKE COUNTY.

266 I.A. 603

MR. JUSTICE DAUGHERTY DELIVERED THE OPINION OF THE COURT.

To an action on the case for personal injuries, upon trial by jury a verdict was returned against defendants the 15th, upon which the court, overruling motions for a new trial and in arrest, entered judgment, which defendants seek by this appeal to reverse.

The declaration in four counts charged negligence in separately operating one of their trains over the [illegible] crossing at Gary, Indiana. The evidence tended to show that plaintiff was employed by defendants as a switchman, and while [illegible] was injured by being struck by a car. The jury returned a verdict finding the defendants guilty and assessing plaintiff's damages at $15,000, upon which the court rendered judgment.

Defendants rely most upon counsel's contention that the evidence fails to show any negligence on the part of defendants, and that plaintiff was not in the exercise of due care at the time he was injured. Whether the verdict and judgment are supported by the evidence and whether plaintiff was guilty of contributory negligence as a matter of fact, and for that reason the judgment should be reversed [illegible] this court. It

is not seriously contended by defendants that they are not guilty of negligence. Indeed, their contention that plaintiff was guilty of contributory negligence would seem to imply that their own negligence is conceded. A plea of contributory negligence is usually held to be in the nature of one in confession and avoidance. 20 Ruling Case Law, par. 92, p. 106.

It appears that plaintiff received the injuries for which he sued about midnight of October 4, 1929, when he was riding in a Ford coupe driven by one Schiff in an easterly direction upon 119th street, a public highway, extending east and west in the city of Chicago, and when, with Schiff, he was returning from Cicero where they visited a friend. Plaintiff sat in the front seat of the Ford and at the right of the driver. At this place on 119th street there are two parallel tracks of the railways of the defendants. On the north track westbound cars moved and on the south track eastbound cars. At a point where 119th street is intersected by Morgan street, another public highway extending north and south, and to the east of it defendants maintained a terminal for their cars. East of Morgan street 119th street is intersected by Peoria street which extends north and south. To the east of Peoria street is Green street, which, however, does not cross 119th street, and east of that is Halsted street, which extends north and south and at 119th street is crossed by the track of a steam railroad. About thirty feet west of Halsted street (the evidence on this point is not so exact as we would wish) is a switch by means of which on some occasions a westbound car would cross over and then run west over the eastbound track. Plaintiff and the driver of the Ford lived in this neighborhood, but both testified (and their evidence is not contradicted) that they were unaware of this occasional practice on the part of defendants in the running of their cars.

in not seriously considered by defendants that they are not guilty of negligence. Indeed, their contention that plaintiff was guilty of contributory negligence would seem to imply that their own negligence is conceded. A plea of contributory negligence is usually held to be in the nature of one in confession and avoidance. 31 Am. Jur. Law. Pro. Pl., p. 102.

It appears that plaintiff received the injuries for which he sued about midnight of October 4, 1924, when he was riding in a Ford coupe driven by one Cahill in an easterly direction upon Lisbon street, a public highway, extending east and west in the city of Chicago, and when, with Cahill, he was returning from Sierra Madre City visited a friend. Plaintiff sat in the front seat of the Ford and at the right of the driver. At this place on Lisbon street there are two partially tracks of the railways of the defendants. On the north track eastbound cars moved and on the south track westbound cars. At a point where Lisbon street is intersected by Broken Arrow, another public highway extending north and south, and to the west of it defendants maintained a terminal for their cars. Side of Broken street 175th street is intersected by Ducro street which extends north and south. To the east of Ducro street is Green street, which, however, does not cross Lisbon street, and east of that is Holland street, which extends north one block to 174th street is crossed by the tracks of a steam railroad. About thirty feet west of Holland street (the evidence on this point is not so exact as we would like) is a switch by means of which on that occasion a westbound car would be transferred from the north track to the south track. Plaintiff drove over and then ran over the switchstand track. Plaintiff and the driver of the Ford lived in this neighborhood, but both testified (and their evidence is not contradicted) that they were unfamiliar with the locality.

The evidence shows without dispute that the collision occurred between one of these cars thus switched to the south track and the automobile which was proceeding along that track in an easterly direction. There is a direct conflict in the evidence as to the precise point at which this collision occurred. The evidence submitted in behalf of plaintiff tended to show that the accident occurred about 150 feet east of Peoria street, while the evidence submitted in behalf of defendants tended to show that it occurred some distance west of Peoria street. This issue of fact has an important bearing on the question of plaintiff's alleged contributory negligence. If the accident occurred 150 feet east of Peoria street, then the testimony submitted by plaintiff tending to show that he received his injuries almost immediately after the street car was switched to the south track and before the driver had time to appreciate and avoid the danger would appear to be reasonable and consistent. On the other hand, if the accident occurred some distance west of Peoria street that fact would tend to sustain the contention of defendant that the car proceeded west on the south track for some time prior to the accident in full view of the driver and of plaintiff. Plaintiff's own evidence shows that he uttered the only warning which he gave to the driver almost at the instant when the collission occurred. The evidence shows without contradiction that the car was well-lighted, and notwithstanding the fact that the evening was rather dark and murky and the street rather illy lighted the car could easily be seen by plaintiff and the driver as it approached. The evidence of plaintiff is to that effect.

Defendants have cited a number of cases which are to the effect that the law will not tolerate the absurdity of permitting one to testify that he looked but did not see danger when the view was unobstructed and where, if he had properly exercised his sight,

he would have seen it. Such cases are Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154; Greenwald v. Baltimore & Ohio R. R. Co., 332 Ill. 627; Bee v. City of Peru, 343 Ill. 36. There is no doubt about the rule of law announced in these cases and that under proper circumstances it would be controlling. The evidence for plaintiff, however, which the jury apparently believed, is to the effect that the street car was switched from the westbound track to the eastbound track only a few seconds before the collision occurred; that it was proceeding at a speed of about twenty-five miles an hour; that plaintiff and the driver were unaware of the location of the switch and of the practice of defendants to thus switch their cars; in short, that while the street car was undoubtedly in plain sight of the occupants of the automobile, it was impossible for them in the exercise of due care to avoid the collision. In other words, their testimony is not that they looked and did not see but that although having looked and seen the street car was transferred to the track upon which they were driving under circumstances which made it impossible for them in the exercise of due care to avoid the collision. It is this contention that makes the exact place at which the collision occurred important. The evidence bearing on that point is in direct conflict, and we are not inclined to disagree with the verdict of the jury on that issue of fact.

The motorman of the street car gave evidence which we are inclined to think quite improbable. He says in substance that he was going west across Peoria street and saw the automobile coming; that it was "twisting in and out, on and off the track;" that he sounded the gong and kept ringing it but the driver "kept on coming toward me and sprang right in and hit the front of the street car." Some evidence was given to the effect that the odor of alcohol was on the clothes and breath of plaintiff, but a clear preponderance of

to the eastbound track

the evidence is to the contrary. The condition of the automobile after the accident and photographs of the situation taken the morning after the accident all tend to corroborate the evidence of the witnesses who testified for plaintiff and to discredit that given by those who testified for defendant. Indeed, the testimony of the motorman would seem to be consistent only with the theories that the occupants of the automobile were either under the influence of liquor or that they desired to commit suicide. The evidence would not justify either finding. The verdict is not against the evidence.

It is complained in the next place that the court erred in giving to the jury plaintiff's instruction No. 12, by which the jury was told:

"While the burden of proof is as a matter of law upon the plaintiff and it is for him to prove his case by a preponderance of the evidence, still if the jury find the evidence bearing upon the entire case preponderates in his favor, but slightly, it would be sufficient for the jury to find the issues in his favor and find a verdict against the defendants."

It is said that this instruction fails to limit the right of recovery to the negligence charged in the declaration, and that a similar instruction was held to be erroneous in Molloy v. Chicago Rapid Transit Co., 335 Ill. 164. In that case the court said of this precise instruction that it first stated that it was for the plaintiff to prove her case by a preponderance of the evidence and referred to the evidence bearing on the plaintiff's case without any statement as to what the case was or what it was necessary for her to prove, but that it referred the whole case to the jury without any limitations. The court said:

"An instruction must limit the right of recovery to the negligence charged in the declaration. (Herring v. Chicago and Alton Railroad Co., 299 Ill. 214; Hackett v. Chicago City Railway Co., 235 id 116; Ratner v. Chicago City Railway Co., 235 id. 169.) This part of the instruction was erroneous."

The court also said that the use of the word "slight" with reference

The court also held that the use of the word "rights" with reference of the instruction was erroneous."

"An instruction must limit the rights of recovery to the cause pleaded in the declaration." (Sterling v. Chicago and Iowa Railway Co., 200 Ill. 124; Hayward v. Illinois City Railway Co., 232 Ill. 178.) This rule applies changing to the declaration. (Sterling v. Chicago and Iowa Railway Co., 200 Ill. 124; Hayward v. Illinois City Railway Co., 232 Ill. 178.) This rule applies changing to the declaration. (Sterling v. Chicago and Iowa Railway Co., 200 Ill. 124; Hayward v. Illinois City Railway Co., 232 Ill. 178.) This rule applies changing to the declaration. (Sterling v. Chicago and Iowa Railway Co., 200 Ill. 124; Hayward v. Illinois City Railway Co., 232 Ill. 178.) This rule applies changing to the declaration. (Sterling v. Chicago and Iowa Railway Co., 200 Ill. 124; Hayward v. Illinois City Railway Co., 232 Ill. 178.) This rule applies

Jury was told:

"While the burden of proof is on a matter of law upon the plaintiff and it is for him to prove his case by a preponderance of the evidence, still if the jury find the evidence bearing upon the matter even preponderates in his favor, but slightly, it would be entitled and it is for this the issues to his favor and find a verdict against the defendants."

It is said that this instruction fails to limit the right of recovery to the negligence charged in the declaration, and that a similar instruction was held to be erroneous in Spring v. Chicago Rapid Transit Co., 238 Ill. 164. In that case the court said of this practice in- struction that it first stated what it was for the plaintiff to prove but came by a preponderance of the evidence and returned to the evi- dence bearing on the plaintiff's case without any reference to what the case was or what it was necessary for her to prove, but that it referred the whole case to the jury without any limitations. The court said:

"An instruction must limit the rights of recovery to the

to the preponderance of the evidence had been criticized on many occasions because it indicated that the preponderance of the evidence was a small matter and tended to minimize it "and thus reduce to the lowest limit, the requirement of a preponderance of the evidence."

In Wolczek v. Public Service Co., 342 Ill. 482, the Supreme Court considering the same instruction said:

"This instruction has been repeatedly condemned as argumentative and as tending to emphasize the weight of the plaintiff's evidence. (Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207; Teter v. Spooner, 305 id. 198.)"

And in Bunch v. Abbott, 256 Ill. App. 33, this court said that the instruction was particularly harmful in that case. The opinion of the court there points out that in Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, and Teter v. Spooner, 305 Ill. 198, the instruction, although criticized, was held not to be reversibly erroneous, the judgments in those cases being affirmed, for the reason that the evidence for plaintiff clearly outweighed the evidence of the defense. Until recently this instruction was given in practically every case of this character tried in the courts of this county. It is subject to the criticisms which have been directed against it, but we think the giving of it should not be held to be reversible error where the court is of the opinion that the evidence for plaintiff preponderates. There is a clear preponderance in this case. While the giving of this instruction must be held erroneous, we hold it is not reversibly so.

Complaint is also made of plaintiff's given instruction No. 15 by which the court told the jury:

"If you believe, from a preponderance of the evidence, under the instructions of the court, that the defendant is guilty of the negligence charged in the plaintiff's declaration, or any count thereof, and that the injuries complained of and alleged in the declaration resulted directly therefrom, and that the plaintiff was in the exercise of ordinary care for his own safety, before and at the time of the accident, the defendant is liable and the plaintiff is entitled to a verdict."

to the preponderance of the evidence has been criticized on many occasions because it indicated that the preponderance of the evidence was a small matter and tended to minimize if [illegible] reduce to the lowest limit, the requirement of a preponderance of the evidence."

In *Colbeck v. Public Service Co.*, 334 Ill. 483, the Supreme Court considering the same instruction said:

"This instruction has been repeatedly condemned as argumentative and as tending to emphasize the weight of the plaintiff's evidence. (*Gulvita v. Chicago Rapid Transit Co.*, 307 Ill. 507; *Peter v. Spooner*, 308 Ill. 156.)"

And in *Judge v. [illegible]*, 266 Ill. App. 33, this court held that the instruction was particularly harmful in that case. The opinion of the court there points out that in *Gulvita v. Chicago Rapid Transit Co.*, 307 Ill. 507, and *Peter v. Spooner*, 308 Ill. 156, the instruction, although criticized, was held not to be reversibly erroneous, the judgments in those cases being affirmed, for the reason that the evidence for plaintiff clearly outweighed the evidence of the defense. Until recently this instruction was given in practically every case of this character tried in the courts of this county. It is subject to the criticisms which have been directed against it, but we think the giving of it should not be held to be reversible error where the court is of the opinion that the evidence for plaintiff preponderates. There is a clear preponderance in this case. While the giving of this instruction must be held erroneous, we hold it is not reversibly so.

Complaint is also made of plaintiff's given instruction No. 16 by which the court told the jury:

"If you believe, from a preponderance of the evidence, under the instructions of the court, that the defendant is guilty of the negligence charged in the plaintiff's declaration, or any count thereof, and that the injuries complained of and alleged in the declaration resulted directly therefrom, and that the plaintiff was in the exercise of ordinary care for his own safety, before and at the time of the accident, the defendant is liable and the plaintiff is entitled to a verdict."

Defendants say that the second count of the declaration alleged that they negligently operated the street car without sounding any horn, ringing the bell or otherwise giving due warning of its approach; that the testimony of plaintiff and the driver clearly establishes the fact that they both saw the car approach, therefore the negligence alleged in the second count was not the proximate cause of the injury and this count should not have been submitted to the jury. Defendants cite Pienta v. Chicago City Ry. Co., 284 Ill. 246; and Van Meter v. Chicago Railways Co., 240 Ill. App. 371. Defendants say that this instruction did not define the issues proper to be considered by the jury but referred them to the declaration and each count thereof to determine the actionable negligence there charged; that the court was requested at the close of plaintiff's case and again at the close of all the evidence to instruct the jury that there could be no recovery under the second count of the declaration but that this request was refused. Defendants also cite Northern Trust Co. v. Chicago Rys. Co., 318 Ill. 402; Cantwell v. Harding, 249 Ill. 354, and many other authorities which hold that it is error to submit to the jury, with instruction that they may return a verdict thereon, any count which there is no evidence to sustain. There is conflict in the evidence as to whether at the time the street car was switched from the westbound to the eastbound track any warning by sounding the gong or otherwise was given. It is true the witnesses for plaintiff said that they could see the car, but they did not say that they saw it at the time it was switched from the one track to the other, and we do not regard the failure to give warning of the change which was about to take place as immaterial and unimportant. The instruction was therefore not erroneous under the circumstances of this case.

Defendants also contend that the court erred in refusing to give instructions Nos. 2, 3 and 4. They do not point out which one of these should have been given but invite the court to find one

of the three. We shall not embark upon this voyage of discovery. The issues in this case are comparatively simple but defendants submitted twenty-five instructions, fourteen of which were given. The instructions given fairly covered every material issue of the case from the standpoint of defendants. The issues were fairly submitted to the jury, and we find no reason to believe that another jury would come to a different conclusion.

It is urged that the damages allowed were excessive, but the injuries were painful and, the evidence tended to show, permanent. This court would not be justified in interfering with the verdict of the jury for this reason. We think substantial justice has been done, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McCurely, J., concur.

35742

MAX LEVIN,
Appellee,

vs.

MEYER J. RUBIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

266 I.A. 603

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On January 7, 1931, Max Levin caused a judgment by confession to be entered against Meyer J. Rubin for $522.50. The judgment was entered on the promissory note made by Rubin on May 26, 1930, whereby he promised ninety days after date to pay to the order of Abe Blank the sum of $500. The note is endorsed on the back by Blank and Levin and contains power to confess judgment. On January 28th thereafter on motion of defendant the judgment was ordered to be opened, defendant allowed to plead, the judgment to stand as security, and the affidavit filed in support of the motion to stand as an affidavit of merits.

The affidavit was afterward amended and, in substance, admits the execution of the note but avers that this note with another for the same amount was delivered by defendant to Abe Blank at the time of its execution for the purpose of negotiating a loan in behalf of defendant at the bank of Blank; that this bank refused to make the loan; that Abe Blank then took the matter up with plaintiff and that plaintiff offered to negotiate a loan on the note at his own bank; that Abe Blank left the note with plaintiff for that purpose and endorsed it; that he thereafter demanded the proceeds of the loan or a return of the note, but that plaintiff refused to deliver either to him; that plaintiff took the note without consideration, is not a bona fide holder, but, on the contrary holds the same without right, title or interest.

There was a trial by the court and a finding for plaintiff in the amount of the judgment by confession, and judgment was

25243

PAT LYNCH, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
ESTHER T. RUNIA, Appellant.	

266 I.A. 603

MR. JUSTICE MACMURRAY DELIVERED THE OPINION OF THE COURT.

In January 7, 1921, Pat Lynch entered a judgment by confession to be entered against Mayer J. Runia for $320.35. The judgment was entered on the promissory note made by Runia on July 24, 1920, whereby he promised eleven days after date to pay to the order of Abe Lynch the sum of $300. The note is endorsed on the back by Lynch and Levin and contains power to confess judgment. On January 26th thereafter on motion of defendant the judgment was ordered to be opened, defendant allowed to plead, the judgment to stand as security, and the affidavit filed in support of the motion to stand as an affidavit of merits.

The affidavit was afterward amended and, in substance, admits the execution of the note but avers that the note with another for the same amount was delivered by defendant to Abe Lynch at the time of its execution for the purpose of negotiating a loan in behalf of defendant at the bank of Lynch; that this bank refused to make the loan; that the Lynch then took the matter up with plaintiff and that plaintiff offered to negotiate a loan on the note at his own bank; that Abe Lynch left the note with plaintiff for that purpose and endorsed it; that he thereafter demanded the proceeds of the loan or a return of the note, but that plaintiff refused to deliver either to him; that plaintiff took the note without consideration, is not a bona fide holder, but, on the contrary holds the same without right, title or interest.

There was a trial by the court and a finding for plaintiff in the amount of the judgment by confession, and judgment was

entered on this finding.

It is contended by defendant that the judgment is against the manifest weight of the evidence; that plaintiff acquired the note from Abe Blank, whose title was defective; that the burden of proof was therefore on plaintiff to show by a preponderance of the evidence that he was a holder in due course and that plaintiff failed so to prove; that the trial court erred in rejecting evidence offered tending to show that Abe Blank took the note without consideration and that the delivery to him was conditional; further, that the court erred in refusing to pass on the propositions of law submitted by defendant and that as a matter of law plaintiff under the evidence was not a holder in due course and took the note subject to equities.

The record shows that at the conclusion of the evidence both sides rested, whereupon the cause was continued until another day; that at that time the court announced, "The judgment of January 8, 1931, judgment by confession, in the sum of $522.50 will be affirmed;" that the attorney for defendant then submitted to the court propositions of law in writing and requested the court to hold or refuse the same; that the following colloquy then occurred:

"The Court: You are a little bit too late, brother.

Mr. Schofield: Not under the law. These are not instructions. These are propositions of law.

The Court: I understand. You are too late. I made my finding.

Mr. Schofield: I submit to the Court contemporaneously with its findings, these propositions of law.

The Court: No, no. Subsequent to the finding of the Court you submit certain propositions of law. You may get that in the record.

Mr. Schofield: Isn't it practically contemporaneous with the finding?

The Court: No, subsequent to the finding of the Court. You are too late.

entered on this finding.

It is contended by defendant that the judgment is against the weight of the evidence; that plaintiff acquired the note from Abe Blank, there title was defective; that the burden of proof was therefore on plaintiff to show by a preponderance of the evidence that he was a holder in due course and that plaintiff failed so to prove; that the trial court erred in rejecting evidence offered tending to show that Abe Blank took the note without consideration and that the delivery to him was conditional; further, that the court erred in refusing to pass on the propositions of law submitted by defendant and that as a matter of law plaintiff under the evidence was not a holder in due course and took the note subject to equities.

The record shows that at the conclusion of the evidence both sides rested, whereupon the cause was continued until another day; that at that time the court announced, "The judgment of January 8, 1931, judgment by confession, in the sum of $252.50 will be affirmed;" that the attorney for defendant then submitted to the court propositions of law in writing and requested the court to hold of return the same; that the following colloquy then occurred:

"The Court: You are a little bit too late, Brother.

Mr. Schofield: Not under the law. There are not instructions. These are propositions of law.

The Court: I understand. You are too late. I made my finding.

Mr. Schofield: I submit to the Court correspondingly with the findings, these propositions of law.

The Court: No, no. Judgment in the finding of the court now submit certain propositions of law. You are not that is the record.

Mr. Schofield: Isn't it practically contemporaneous with the finding?

The Court: No, judgment in the finding of the Court. You are too late.

Mr. Schofield: May I have the record disclose that the Court indicates its finding and immediately thereafter I submit them to the Court?

The Court: I did not indicate. I made a finding and the record will so show it, and subsequently thereto you made your tender. Let the record show it right.

Mr. Schofield: Immediately subsequent to the finding of the Court.

The Court: Yes.

Mr. Schofield: Immediately subsequent to the finding of the Court I tender to the Court these propositions of law and I ask that they be marked as Defendant's Exhibit 1.

The Court: All right, mark them. (Document marked as requested.) Call the next case.

Mr. Schofield: I desire to take an exception to the refusal of the Court to consider and pass on the propositions of law submitted."

The court should have received and held or refused the propositions of law submitted. Belke v. Bush, 213 Ill. App. 29. Provisions of section 61 of the Practice act (Smith-Hurd's Ill. Rev. Stats., 1931, p. 2203) are mandatory, and a failure to comply therewith on the part of the trial court may be reversible error. Parisian Novelty Co. v. Advertisers Mfg. Co., 248 Ill. App. 162. The court should not have acted in an arbitrary manner. The issues in this case, however, are few and simple; such an error is not necessarily reversible, and for reasons hereinafter expressed we think should not be held to be reversible in this case.

There is uncontradicted evidence tending to show that the note sued on, as well as another note for the same amount, was delivered by defendant to one Abe Blank on or shortly after the date upon which it was executed, which was May 26, 1930; that the note was delivered to Blank for the purpose of discounting the same in behalf of the maker. It is urged that the court erred in refusing to receive other evidence offered tending to show that Blank, the payee, acquired the note from the maker without consideration and for a special purpose, and that the delivery of the instrument by

Mr. Schofield: May I have the record disclose that the Court indicates its finding and immediately thereafter I submit that to the Court?

The Court: I did not indicate. I made a finding and the record will so show it, and subsequently thereto you made your remarks. Let the record show it right.

Mr. Rumelian: Immediately subsequent to the finding of the Court.

The Court: Yes.

Mr. Schofield: Immediately subsequent to the finding of the Court I tender to the Court these proceedings at law and I ask that they be marked as Defendant's Exhibit C.

The Court: All right, were they. (Document marked as requested.) Call the next case.

Mr. Schofield: I desire to take an exception to the ruling of the Court to consider and pass on the propositions of law submitted.

The court should have rejected and held or refused the propositions of law submitted. Taylor v. Cobb, 214 Ill. App. 20. Presumptions of evidence in favor of the prevailing suit (Gulf, C. & S. F. R. Co. v. Bates., 1921, 2. 3000) are mandatory, and a failure to comply therewith on the part of the trial court may be reversible error. Portable Elevator Co. v. Independence Ry., 2g., 296 Ill. App. 182. The court should not have acted in an arbitrary manner. The issues in this case, however, are few and slight; and it would not necessarily reverse, and for reasons hereinafter enumerated we think should not be held to be reversible in this case.

There is sufficient evidence tending to show that the note sued on, as well as pointed out by the same account, was delivered by defendant to plaintiff. It is urged that the court erred in refusing upon which it was executed, viz., May 28, 1920; that the note was delivered to Plaintiff by defendant thereafter for a specific purpose, namely, without consideration and to receive other evidence relative to same [illegible], the court in refusing the same to do so. The burden of disproving the case rested upon the maker. It is urged that the court erred in refusing for a specific purpose, and that the delivery of the instrument by

defendant to Blank was a conditional delivery. The evidence, we think, should have been admitted, but in view of the fact that all this was established by other uncontradicted evidence we hold defendant was not prejudiced by such error.

Defendant contends that since under the undisputed evidence plaintiff acquired the note from Blank, whose title was defective (by reason of section 55 of the Negotiable Instruments act), the burden of proof was cast upon plaintiff to prove by a preponderance of the evidence that he was a holder in due course in order to enable him to recover upon his claim. That this is the law is established by numerous cases in this court and the Supreme court construing said section 55. Strauss v. Citizens State Bank, 254 Ill. 185; Bell v. McDonald, 308 Ill. 329; Foncannon v. Lewis, 327 Ill. 455; Owens v. Bagel, 334 Ill. 96; First National Bank of Harvey v. Trott, 236 Ill. App. 412; Board v. Baxter, 242 Ill. App. 480; Schmidt v. Schmidt, 253 Ill. App. 514; Hough v. Tolson, 254 Ill. App. 126; Tollifsen v. Middle States Investment Co., 253 Ill. App. 320; Todt v. Shull, 260 Ill. App. 133.

The controlling question in the case therefore is whether the finding of the court that plaintiff took the note before maturity and for value without notice of defendant's rights is manifestly against the weight of the evidence. Upon this crucial and controlling question the evidence is in direct conflict. Abe Blank, testifying for defendant, said that a few days after the date of the execution of the note he informed plaintiff fully of defendant's rights and of the purpose for which the note had been delivered, namely, that it was to be used to negotiate a loan at defendant's bank; that plaintiff took the note with full knowledge, agreeing that he would carry out the purpose for which it was delivered, but afterward failed and refused to comply with these promises in that

regard. On the other hand, plaintiff testifies that he was not informed in regard to any conditional delivery of the note, but says that Abe Blank was indebted to him and brought the note to him not on or about the date of its execution, but prior to its maturity, on July 21, 1930; that Blank at that time requested from him a loan of money and finally offered him the note to apply on an account due to plaintiff from Blank and on the delivery to Blank of plaintiff's check for $75 payable to currency. The check was produced in court but by inadvertence apparently was not offered in evidence. Blank, however, admitted that he received the check and collected it. His testimony is to the effect that he and plaintiff at times kited checks with each other, but the evidence does not indicate that the transaction on July 21st was one of kiting checks. If that had been the case it would have been possible for Blank to produce the check given in exchange. Later in the year Blank filed a voluntary petition in bankruptcy and scheduled plaintiff as one of his creditors. It also appears by the evidence of Blank and of defendant that when defendant discovered that the note was in the bank for collection he took the matter up with Blank who gave to defendant his own personal note in order to save defendant harmless in the matter. It appears, therefore, that plaintiff's account of the transaction is corroborated by the check given at the time and by the other circumstances we have pointed out.

The court saw and heard the witnesses give their quite contradictory testimony. The finding of the court is entitled here to the same weight as the verdict of a jury, and in view of that fact and the corroborating circumstances we are not able to say that the court erred in finding that plaintiff was a holder of the note upon which he sues in good faith and for value before its maturity. If such was the fact he was, of course, entitled to recover. The judgment of the trial court is therefore be affirmed.

AFFIRMED.

O'Connor, P. J., and McBurely, J., concur.

35752

THE M. SIMONS & SON CO., INC., a Corporation,
Appellee,

vs.

JENKINS & ADAIR, INC., A Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

266 I.A. 603

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of $337.80 entered in favor of plaintiff and against defendant upon the finding of the court in an action of the fourth class.

The statement of claim averred that plaintiff was conducting a business as foreign sales factors; that on or about April 4, 1931, defendant agreed to pay plaintiff ten per cent commission for obtaining purchasers of its goods, wares and merchandise for export other than to the British Isles; that during the month of April, 1931, plaintiff obtained a customer for defendant, namely, Messrs. Elion, Switzerland, who purchased goods, wares and merchandise from defendant in the total sum of $3378; that plaintiff thereupon became entitled to a commission of ten per cent, which defendant refused to pay upon request. Defendant filed an affidavit of merits asserting a defense to the whole demand, admitting that plaintiff was engaged in business as a foreign sales factor, but denying that on or about April 4, 1931, it agreed to pay plaintiff a ten per cent commission for obtaining purchasers of its goods, as alleged, or that Elion of Switzerland purchased any goods whatsoever.

It is urged for reversal that the finding and judgment is contrary to the manifest weight of the evidence, and that the court erred in excluding evidence offered by defendant and in denying a motion at the close of all the evidence to find the issues in favor of defendant. In support of this last contention it is urged that

35782

THE H. HIRSCH & CO. TRUST CO., INC.,
a Corporation,
Appellee,

vs.

JENKINS & KLEIN, Inc.,
A Corporation,
Appellant.

No. 6603.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This is an appeal by defendant from a judgment in the sum of $337.50 entered in favor of plaintiff and against defendant upon the finding of the court in an action of the fourth class.

The assignment of error charges that plaintiff was conducting a business as therein set forth; that on or about April 1, 1921, defendant agreed to pay plaintiff two per cent commission for obtaining purchasers of its products, which commission was to be paid on the 15th day of the month following; that during the month of April, 1921, plaintiff obtained a customer for defendant, namely, Hedges, Hilton, Butterfield, who purchased goods, wares and merchandise from defendant to the total sum of $33750; that plaintiff thereupon became entitled to a commission of two per cent, which defendant refused to pay upon request. Defendant filed an affidavit of merits denying the allegations of the complaint, admitting that plaintiff was employed by defendant as a traveling salesman, but denying that as or about April 4, 1921, it agreed to pay plaintiff a two per cent commission in addition to a traveling salesman's salary, but saying that as and for plaintiff's services defendant agreed to pay plaintiff a commission of two per cent on the net amount of sales made by plaintiff to customers secured by plaintiff, but only when and after the same had been fully paid for, and that plaintiff was employed by defendant as a traveling salesman and drew his salary and commissions.

It is urged for reversal that the finding and judgment is not supported by the evidence, is against the law, and that the court erred in admitting evidence of the witness, and that the court erred in sustaining objections to questions propounded to plaintiff on cross-examination.

there was in fact no evidence of a sale to the parties named and for the price averred, except a statement contained in a letter from plaintiff to defendant dated April 14, 1931, and it is argued on the authority of Hately v. Kiser, 253 Ill. 288, that this evidence is wholly insufficient as a matter of law to establish the fact of the sale.

If that letter stood alone in the record there would be merit in this contention. However, it does not stand alone. It is only one of a series of letters in an extended correspondence between the parties which were admitted in evidence without objection. The correspondence, so far as the same appears from the record, began with a letter from plaintiff to defendant dated March 26, 1931. On March 30th defendant wrote plaintiff replying to the letter from plaintiff dated March 26th, "in reference to sound recording equipment with an additional bit regarding one Mr. Richard Vogl of Flushing, Long Island, N. Y." That letter also states that as soon as descriptive matter and illustrations are available the writers will be glad to send the information, and that as Vogl is interested in apparatus for shipment abroad to points outside of the British Isles, "we will be glad to offer you a commission of 10% on such sales as may be consummated." On April 1st plaintiff wrote that Vogl and Geisler had been offered defendant's equipment for shipment abroad by plaintiff, adding, "They are leaving for Chicago today and we have suggested that they immediately confer with you in the event that they require a demonstration or closer examination of your apparatus." This letter also requests defendant to quote the prices in its catalogue, stating, "We of course understand that you will allow us a further discount of 10% plus the usual 2% cash discount." On April 4th defendant replied, thanking plaintiff for the information regarding Vogl and Geisler as contained in its letter of April 1st, and stating:

"We will be pleased to offer you a commission of 10% on the sale of any apparatus to these gentlemen, provided it is for export and not to the British Isles.

Be assured that we have complete facilities for display and demonstrating the equipment you speak of in your letter."

On April 14th plaintiff wrote that it had just had a farewell conference with Geisler and "naturally are pleased to learn of his initial order placed with you at Chicago having a total valuation of $3378.00 U. S. currency. In order to keep our records on this transaction more accurately, please forward us a duplicate of your acknowledgment covering this transaction." In a postscript to the letter plaintiff tells defendant that Geisler will be sailing for Europe on the morrow and suggests a telegram to him at the steamer wishing him "bon voyage." On April 18th defendant replied:

"We were rather surprised to receive your letter of April 14th claiming commission on the sale of apparatus which eventually is to reach Elion S. A.

The Elion organization are distributors for the Enterprise Optical Co. of 564 W. Randolph St., Chicago, and many weeks ago, before the Elion representative started for this country, we made arrangements with the Enterprise Optical Co. to supply recording apparatus for this account. Our order was made out against the Enterprise Optical Co. and we received the remittance from them. Presumably, they in turn billed Elion.

It was not until March 26th that we received a letter from you on the subject of possible purchase but even then we did not see the connection as your letter of March 26th mentioned a Mr. Vogl of Flushing, L. I., New York, with no reference to the Elion organization or Mr. Geo. Geisler.

We are sorry this mix-up has occurred, but we have had to allow the Enterprise Optical Co. a 10% discount since the purchase by themwas made for re-sale purposes. Under the circumstances, it would not be hardly possibly for us to pay another commission to your organizations.

In order to avoid any future misunderstanding, please give full details of any prospective client sent to us together with your business connections with him."

This letter presumably contains a statement of all the reasons that occurred to defendant at the time it was written which from its standpoint would justify a refusal to pay commission on this sale to plaintiff. These reasons question neither the fact that a sale was made nor the amount of it. The inference is so clear as to amount to an admission that the sale was in fact made and for the price stated. The case is not different from what it would

have been had the parties communicated orally instead of by writing. It amounts in substance to this: Plaintiff says, "You sold goods to the amount of $3378 to the customer I sent you. He was the kind of customer you told me to send." Defendant replies: "I do not owe commission on that sale because it was in fact made to another party and not to the customer sent by you." If a sale had not in fact been made or if it was for an amount different from that which plaintiff stated, it is not to be supposed that defendant would have failed so to state. It cannot be held on this evidence that there was no evidence tending to show the sale as alleged.

We think, however, the court erred in excluding other evidence offered by defendant on that and other issues. The theory of the defense was not that no sale had been made but that defendant sold to the Enterprise Optical Co., not the customer recommended to defendant by plaintiff. Evidence of the president of the defendant company was offered tending to show this fact and that negotiations were pending looking toward such a sale more than a month before March 30, 1931, then the letter upon which plaintiff relies was written. The court, however, excluded all this evidence, saying that he was not interested in how the sale came about, and that the only question before the court was the transaction with plaintiff, and questions as to whether a sale was made to Vogl and Geisler by defendant were ruled out upon plaintiff's objection. It is now argued that some of these questions are objectionable in form, but the objection made was that the evidence was irrelevant and immaterial. Plaintiff argues that these rulings were correct on the authority of Day v. Porter, 161 Ill. 235, and similar cases, but the facts there are not at all similar to the facts in this case. The issue here is whether the sale was in fact made to the Enterprise Optical Co. or to one of the parties directed to defendant by plaintiff. Any collateral facts which would have a direct

by plaintiff. Any collateral facts which will have a direct bearing on the issue here if material to the case. The issue here is whether the sale was in fact made to the Interprise Optical Co. or to one of the parties directed to defendant but the facts there are not at all similar to the facts in this the authority of Gay v. Porter, 121 Ill. 385, and similar cases, immaterial. Plaintiff argues that these rulings were correct on but the objection made was that the evidence was irrelevant and argued that none of these questions are objectionable in form, tendant were ruled out upon plaintiff's objection. It is now questions as to whether a sale was made to Vogt and Gutzler by defense inquired whether the contract was the transaction with plaintiff, and not interested in how the sale came about. Did that only the court, however, excluded all this evidence, saying that he was 30, 1931, when the letter upon which plaintiff relies was written. pending looking toward such a sale more than a month before April was offered tending to show this fact and that negotiations were defendant by plaintiff. Evidence of the president of the corporate sold to the Enterprise Optical Co., not the customer recommended to the defense was not that no sale had been made but that defendant dence offered by defendant on that and other issues. The theory of

We think, however, the court erred in excluding competent evi- there was no evidence tending to show the sale to Vogt and Gutzler had not been made to the customer sent by plaintiff. If a sale had not in fact been made or if it was for an amount different from that which plaintiff stated, it is not to be supposed that defendant would have failed so to state. It cannot be held on this evidence that one commission on that sale because it was in fact made to another party and not to the customer sent by plaintiff." If a sale had not been made to the customer sent by plaintiff, defendant replied: "I do not of customer plaintiff told me to send." Defendant replied: "I do not to the amount of $5249 to the customer I sent you. He was the kind It amounts in substance to this: Plaintiff says, "Ten sold goods have been had the parties communicated orally instead of by writing.

tendency to show that the evidence of one side was more reasonable than that of the other were admissible. Standard Brewery v. Healy, 209 Ill. App. 272. All the facts surrounding the sale should have been allowed in evidence and were necessary in order that the truth of the matter might be determined by the court. The fact of the sale and verbal declarations which accompanied that act as a part of it were all admissible. We hold the exclusion of this evidence was reversible error, and the judgment is therefore reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

tendency to show that the evidence of one side was more reasonable than that of the other were admissible. Commonwealth v. Leslie, 3 D III. App. 572. All the facts surrounding the case should have been allowed in evidence and were necessary in order that the truth of the matter might be determined by the court. The fact of the male and verbal declarations which accompanied same act as a part of it were all admissible. To hold the exclusion of this evidence was reversible error, and the judgment is therefore reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Stanley, J., concur.

35791

ALEX GETZ & CO., a Corporation,
Appellee,

vs.

WALTER A. WADE,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

266 I.A. 603

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff corporation brought an action in assumpsit, filing a declaration on the common counts with an affidavit of claim attached thereto and later, by order of court, a bill of particulars showing a claim for money received by defendant to the amount of $2411.63, with interest at 5% from November 1, 1929. Defendant filed a plea of the general issue with an affidavit of merits denying that anything was due. There was a trial by jury, and at the close of all the evidence the court instructed the jury to return a verdict for plaintiff and assess damages at the sum claimed less interest. Defendant moved for judgment non obstante veredicto, which, as well as motions of defendant for a new trial and in arrest of judgment, was denied and judgment was entered upon the verdict, which defendant asks shall be reversed.

Plaintiff has assigned as cross error the failure of the court to allow interest at five per cent from November 1, 1931, to the date of judgment and asks that the judgment rendered be set aside and that another judgment including interest be entered here.

The material facts upon which this controversy is based are not disputed. On December 29, 1928, and for many years prior thereto, Alex Getz conducted business in Chicago as a wholesale dealer in eggs and poultry. On that date he notified his creditors that he could not pay his debts and that he was calling them to a meeting at the Morrison hotel on January 2, 1929. His creditors met with him on that date, and his attorney, Mr. Fireman, was also

ALEX ORTZ & CO., a Corporation,
Appellee,

vs.

WALTER A. PAGE,
Appellant.

256 I.A. 603

24. JUDICIAL NOTICE; DECISIONS OF COURTS OF THE UNITED.

Plaintiff corporation brought an action to recover, filing a declaration on the common counts with an affidavit of claim attached thereto and later, by order of court, a bill of particulars stating a claim for money received by defendant to the amount of $2411.83, with interest at 5% from November 1, 1919. Defendant filed a plea of the general issue with an affidavit of merits denying that anything was due. There was a trial by jury, and at the close of all the evidence the court instructed the jury to return a verdict for plaintiff and assess damages at the sum claimed less interest. Defendant moved for judgment non obstante veredicto, which, as well as motions of defendant for a new trial and in arrest of judgment, was denied and judgment was entered upon the verdict, which defendant here seeks to have reversed.

Plaintiff has assigned as cross error the failure of the court to allow interest at five per cent from November 1, 1917, to the date of judgment and make that judgment include interest be
not merely the sum whether judgment including interest ~~is~~ entered
more.

The material facts upon which this controversy is based are not disputed. On December 27, 1916, and for many years prior thereto, Alex Ortz conducted business in Chicago as a wholesale dealer in eggs and poultry. On that date he notified his creditors that he would not only pay 10% cents and that he was calling them to a meeting at the Morrison Hotel on January 2, 1917. His creditors met with him on that date, and his attorney, Mr. Kirsch, was also

present. As a result of negotiations the creditors and Mr. Getz entered into an agreement in writing, which in substance provided that as Mr. Getz was unable to pay his creditors he would organize a corporation with a capital stock of not more than $500,000, transfer all the assets employed in his business to this corporation in exchange for its common stock, and then execute and deliver to his creditors notes for the respective amounts due to them and pledge as collateral thereto propertional shares of this common stock. This corporation was organized January 15, 1929. Alex Getz subscribed for all its shares less four. One of these four was taken by his wife, another by his office man, Mr. Brown, and the other two by Meyer Getz and Herbert Frankel, respectively. Alex Getz's stock was issued in his name, the certificates duly endorsed by him in blank and the same were delivered to the respective creditors with notes for the amount due them as provided by the contract.

In July, 1929, the creditors of Mr. Getz held a meeting at the office of the attorneys of one of the creditors, because they had learned that plaintiff was about to sell to Armour & Co. a valuable egg plant located in the state of Iowa. At this meeting the creditors insisted that this should not be done without their consent, talked of an application for a receiver, and some of them, who were warehousemen and held eggs in storage belonging to the corporation intimated that Mr. Getz would not be allowed to withdraw the same without paying his indebtedness. The creditors agreed that an audit of the business should be made, and this was later done. Another meeting was held at a later date, and the creditors were then informed that the plaintiff corporation was about to receive $135,000 for the Iowa plant. Although their respective notes were not due the creditors insisted that this money when received should be turned over to them to apply on the indebtedness. Defendant represented the creditors as their attorney, and on September

23, 1929, the attorneys for plaintiff gave him a writing which recited the execution of the collateral promissory notes of Alex Getz on February 1, 1929, due on or before two years after date, to the total amount of $131,300, and recited that the plaintiff corporation was handing him therewith checks to the amount of $46,364.33, and that the Monarch Refrigerating Co. was to pay defendant immediately for the account of the corporation $7,885.42, which was due to plaintiff from said Refrigerating Co., making a total sum of $54,249.75, which the writing recited "is to be immediately paid out by you as a 30% payment on the principal of said notes, each of said creditors to receive from you immediately 30% of the principal of the said notes." Defendant received the said sum of $7,885.42 from the Refrigerating Co., and on September 26, 1929, proceeded to make distribution according to said written directions. There remained in his hands after distribution $9.75.

At a meeting of the creditors held at defendant's office Mr. Getz told them that he had used some of the proceeds of the sale of the egg plant in the purchase or "hedging" of eggs; that he thought the creditors should get some of it; that he would pay 25% of their claims and would turn over whatever profits were derived from eggs in storage to the creditors to be applied on their notes and that in addition to the 30% he would place the profits received on these eggs with defendant for distribution pro rata among the creditors, it being agreed that defendant would receive the money as the agent of the creditors for distribution among them according to their respective interests. Pursuant to that promise five checks representing the profits derived from the sale of these eggs were delivered by plaintiff to defendant to be prorated among the creditors of Getz. In each case the eggs had been deposited with one of the creditors who had advanced money thereon. Defendant offered to prove that these eggs were purchased with funds advanced by creditors

22, 19--, the attorneys for plaintiff gave him a writing ordering the execution of the collateral promissory notes of Alex Gelt on February 1, 19--, due on or before two years after date, to the total amount of $[illegible], and reciting that the plaintiff corporation was handing the thereinto described in the amount of $46,244.83, and that the Amazon Refrigerating Co. was to pay $endment immediately to the account of the corporation $7,[illegible], which was due to plaintiff from said Refrigerating Co., making a total sum of $54,289.70, which the writing recited "is to be immediately paid out by [illegible] as a 70% payment on the principal of said notes, each of said creditors to receive [illegible] 30% of the principal of the said notes." Defendant received the said sum of $7,[illegible] from the Refrigerating Co., but on September 24, 19--, proceeded to make distribution according to said written directions. There remained in his hands after distribution $2.74.

At a meeting of the creditors held at defendant's office Mr. Dale told them that he had used some of the proceeds of the sale of the egg plant in the purchase of "pedigree" of eggs; that he thought the creditors should get back at least 11; that he would pay by of their claims and would turn over thereafter utility note derived from eggs in storage to the creditors to be applied on their notes and that in addition to the $47 he would divide the profits received on those eggs with defendant for distribution per [illegible] among the creditors, it being agreed that [illegible] would receive the money to their respective interest. Thereupon he then promised to pay creditors the $47 and advanced money thereon. Defendant offered to [illegible] that [illegible] notes pertaining with those advanced by creditors the creditors was [illegible] money thereon. Defendant offered to [illegible] of sale. If each [illegible] with one of [illegible] delivered by plaintiff to defendant it be [illegible] among the [illegible] to their respective interest. Thereupon he then promised to pay creditors the $47 and advanced money thereon. Defendant offered to [illegible] that [illegible] notes pertaining with those advanced by creditors

in whose warehouses they were stored, upon the understanding that the profits derived from the sale of the same should be applied to the liquidation of the indebtedness of Alex Getz. This evidence was excluded by the court. Plaintiff on different dates thereafter turned over to defendant five checks, which, with the balance of $9.75 remaining in his hands, made a total sum of $2,411.67, which remains in defendant's possession and which prior to bringing suit plaintiff demanded be returned to it.

The suit of plaintiff corporation is for money had and received and is brought upon the theory that the acts of the plaintiff corporation in delivering to defendant these checks to be paid by him to the personal creditors of Alex Getz was ultra vires the corporation. Defendant replies that under the facts as here disclosed the corporation must as a matter of law be held to have assumed and to have agreed to pay the indebtedness of Alex Getz to his creditors, and he cites Andres v. Morgan, 62 Ohio St. 236, 56 N. E. 875; Acorn Lumber Co. v. Friedlander Box Co., 240 Ill. App. 425, and Chicago Smelting & Refining Co. v. Sullivan, 246 Ill. App. 538, in which cases, under circumstances not substantially different from those which here appear, a corporation was held to be so liable. If that rule is applicable, plaintiff's case must fail because the money was turned over to defendant not alone for the purpose of paying the debts of a third person but also in order to satisfy a legal obligation of the corporation which it had assumed as a result of its incorporation. In the Acorn Lumber Co. case, we said:

> "The question whether a corporation organized to take over and to continue a business theretofore carried on by an individual or by a partnership and where it issues its stock for the assets, is liable for the debts of such individual or copartnership, has not so far as we are advised been squarely decided by our Supreme Court, and the authorities from other jurisdictions are not in harmony. But we are of the opinion that upon reason and authority, the corporation should be held liable in such circumstances."

A large number of authorities from different jurisdictions is there

cited which it is unnecessary to repeat here. In Chicago Smelting & Refining Corp. v. Sullivan, supra, we said:

"We are disposed to be in accord with the conclusion expressed in the opinion of another division of this court in Acorn Lumber Co. v. Friedlander Box Co., 240 Ill. App. 425, and to hold that, where the former partners are the only members of the corporation and the assets of the partnership have been transferred to the corporation for the continuance of the business in exchange for stock and without other consideration, and where, to use the apt words in the opinion in Andres v. Morgan, 62 Ohio St. 236, 'the members of the partnership may be said to have simply put on a new coat,' the corporation thereby impliedly assumes the partnership debts and is prima facie liable therefor."

Plaintiff seems to contend that this defense was not presented in the trial court and that it may not therefore be successfully urged here, and it cites a number of cases such as Lowy v. Standard Elevator Co., 296 Ill. 295. It was held in that case that a party might not in an Appellate tribunal maintain successfully a position which was inconsistent with that taken in the trial court. We do not understand that the position of defendant in this court in this matter is inconsistent with any position maintained by it in the trial court. If such fact appears from the record, it has not been pointed out in the briefs of plaintiff.

Plaintiff also seems to contend that the affidavit of merits was not broad enough to permit the introduction of this defense. Plaintiff, however, did not object when the evidence in support of the defense was offered and does not now argue that the court erred in its rulings on the admission of evidence. It is true, as plaintiff contends, that the object of section 55 of the Practice act is to limit the issues at the trial, but the pleadings of defendant seem to have been responsive to those of plaintiff and seem to give as full and accurate information of the defense interposed as the pleadings of plaintiff give of the claim presented. Harrison v. Roschill Cemetery, 291 Ill. 416, relied on by plaintiff, well illustrates this point. Indeed, this record does not disclose to this court that the defense now insisted on was not presented in the trial court.

cited which it is unnecessary to repeat here. In Phipps Dentists

& Defining Corp. v. Sullivan, supra, we said:

"We are disposed to be in accord with the construction ex-
pressed in the opinion of another division of this court in Lorrie
Lumber Co. v. Fleischauer Lbr. Co., 240 Ill. App. 422, and to hold
that, where the former partners are the only members of the cor-
poration and the assets of the partnership have been transferred
to the corporation for the continuance of the business in produce
for stock and without other consideration, and where, as was the
case in the opinion in Andree v. Carson, 82 Ohio St. 210,
'the members of the partnership only by will to have simply put on
a new coat,' the corporation thereby impliedly assumed the partner-
ship debts and is prima facie liable therefor."

Plaintiff seems to contend that this defense was not pre-
sented in the trial court and that it may not therefore be rec-
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Law v. Standard Elevator Co., 288 Ill. 178. It was held in that
case that a party might not in an appellate tribunal maintain con-
sistently a position which was inconsistent with that taken in the
trial court. We do not understand that the position of defendant
in this court in this matter is inconsistent with any position main-
tained by it in the trial court. It only rests upon the rec-
ord, it has not been pleaded out in the brief of plaintiff.

Plaintiff also seems to contend that the affidavits of
merits was not broad enough to permit the introduction of this
defense. Plaintiff, however, did not object when the evidence in
support of the defense was offered and does not now argue that the
court erred in its rulings on the admission of evidence. It is
true, as plaintiff contends, that the object of section 58 of the
Practice act is to limit the issues at the trial, but the pleadings
of defendant seem to have been responsive to those of plaintiff and
seem to give as full and accurate information of the defense intend-
posed as the pleadings of plaintiff give of its claim presented.
Marlatt v. Modelli Cement, 287 Ill. 414, relied on by plain-
tiff, well illustrates this point. Indeed, this record does not
disclose to this court that the defense now insisted on was not
presented in the trial court.

Again, plaintiff asserts that the creditors of Getz dealt with plaintiff as a corporation, and are now estopped to deny its existence, citing Ramsay v. Peoria Marine & Fire Ins. Co., 55 Ill. 311. The rule which defendant here relies on does not require a denial of corporate existence, and the corporate existence of plaintiff was not questioned in this case. There was no issue of nul tiel corporation. It is not claimed that the corporate entity is being used for a fraudulent purpose, but it is claimed that under all the circumstances the corporation by implication assumed the debts of Getz when it took over to itself in payment for its entire capital stock the property out of which alone those debts might be satisfied. Plaintiff undertakes to distinguish the Chicago Smelting case, saying:

"There was not any dealing with the corporation as such by those who were seeking to disregard the corporate entity. In the case at bar the very purpose of having the creditors agree to the incorporation, was for the purpose of relieving the assets of Alex Getz and the assets of the corporation from being taken by the creditors."

This argument, however, disregards the important fact, which here appears without contradiction, that the plaintiff corporation has construed the transaction to the contrary and, we think, waived any technical rights it may have had by voluntarily turning over this money to defendant for distribution to the creditors. There is no doubt the ultimate purpose of the entire transaction and of the agreements with reference to the same was the payment of the debts of Alex Getz. That end and purpose seem to have been accomplished. The action which plaintiff brought for money had and received is equitable in its nature. As was said in Moses v. MacFerlan, 2 Burrow, 1005, 97 Eng. Rep. 676:

"In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money;"

and this conception of the law applicable to such actions has been

Again, plaintiff asserts that the creditors of both
with plaintiff as a corporation, and are now estopped to deny its
existence, citing Dorsey v. Myrtle Cemetery & Fire Ins. Co., 21 Ill.
311. The rule which defendant here relies on does not reach a
denial of corporate existence, and the corporate existence of
plaintiff was not questioned in this case. There was no issue of
fact tried concerning it. It is not clear that the particular policy
is being used for a fraudulent purpose, but it is claimed that
under all the circumstances the corporation by limitation assumed
the risks at bats when it took over the [illegible] to payment for its
entire capital stock the property of a [illegible] there
might be modified. Plaintiff endeavors to distinguish the
Chicago Building case, saying:

"There was not any dealing with the corporation as such by
those who were sought to be charged [illegible]. In the
case at bar the very purpose of [illegible] was [illegible] at the
incorporation, was for the purpose of relieving the members [illegible]
debts and the assets of the corporation free [illegible] the
creditors."

This argument, however, disregards the important fact, which here
appears without contradiction, that the plaintiff corporation was
organized without [illegible] and the [illegible], as [illegible], waived
any technical rights it may have had by voluntarily [illegible] over
this money to defendant for distribution to the creditors. There
is no doubt the ultimate purpose of the mutual transaction was to
the advancement with reference to the time for the payment of the
debts of that date. That was the purpose as [illegible] the
[illegible], 3 Barnes, 1005, 20 Ind. App. 478:

"In any event, the fact of this kind of action is, that the
defendant, under the circumstances of the case, is estopped by the
[illegible] of mutual justice and equity to refund the money:"

and this conclusion of the law applicable to such matters has been

adopted and followed by the courts of this State in a long line of cases beginning with Taylor v. Taylor, 20 Ill. 651, and followed in Belden v. Perkins, 78 Ill. 449, and numerous other cases. In order to recover in this class of cases it is not sufficient that plaintiff bring its case within mere technical legal rules. It must show that defendant holds money which ex aequo et bono belongs to plaintiff. The doctrine of ultra vires, on which plaintiff relies, is purely technical in its nature and often leads to inequitable results. Plaintiff has itself recognized the ultimate purpose of its existence by turning over this money to defendant for distribution to the creditors of Alex Getz. It has thereby waived all technical objections. Defendant as the representative of the creditors now has the possession of money which in equity and good conscience belongs to these creditors. It matters little whether the route by which these funds travelled was long or short. The money is where it was designed to go and where it ought to be. Plaintiff cannot wrest it from the person who in equity and good conscience has a right to hold it by an action for money had and received.

We hold as a matter of law that on the evidence in this record plaintiff cannot recover, and the judgment is therefore reversed with a finding of facts and judgment here for defendant for costs.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE FOR DEFENDANT FOR COSTS.

O'Connor, P. J., and McSurely, J., concur.

recovered plaintiff cannot recover, but the jurisdiction is therefore retained with a finding of fact and judgment entry for defendant for costs.

O'Connor, J., and McCarthy, J., concur.

35791 FINDING OF FACTS.

We find as a fact that the money for which plaintiff in this case sues is rightfully in the possession and control of defendant; that plaintiff as a matter of fact and law has failed to submit evidence sufficient to maintain its action, and that judgment should be entered in this court in favor of defendant, Walter A. Wade, and against plaintiff, Alex Getz & Co., a corporation, for costs.

1892J FINDING OF FACT.

We find as a fact that the money for which plaintiff in this case sues is rightfully in the possession and control of defendant; that plaintiff by a matter of fact and law has failed to maintain evidence sufficient to maintain its action, and that judgment should be entered in this court in favor of defendant, Baltor & Tate, and against plaintiff, Wise Corn Co., a corporation, for costs.

35145

MARTHA KOVASH,
Appellee,
v.
ALEX KOVASH,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

60

7

266 I.A. 603

Opinion filed May 4, 1932

MR. PRESIDING JUSTICE HESEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a decree entered in a separate maintenance proceeding finding the defendant guilty of extreme and repeated cruelty towards the complainant, and that the defendant without cause ordered the complainant out of their home, since which time she has lived separate and apart from the defendant without fault on her part; that she have the care and custody of their minor child, Martha Kovash, and that the defendant may visit the child at reasonable hours. It was further ordered that the defendant pay the complainant $15.00 a week for her support, and also $10.00 a week for the child's support until the further order of the court.

The defendant makes two points for a reversal of this decree:

1. That the decree is contrary to the manifest weight of the evidence; and

2. That the child Martha Kovash is not the daughter of the defendant.

As to the first point, it appears that the complainant for a number of years was housekeeper for the defendant, a widower and the father of three children. His children were young at the time the complainant came to live with the defendant as his housekeeper and she had the care of these children.

The complainant gave birth to a female child on August

Opinion filed May 4, 1933

266 I.A. 603

The defendant appeals from a decree entered in a separate maintenance proceeding finding the defendant guilty of extreme and repeated cruelty towards the complainant, and that the defendant without cause ordered the complainant out of their home, since which time she has lived separate and apart from the defendant without fault on her part; that she have the care and custody of their minor child, Bertha Loveen, and that the defendant may visit the child at reasonable hours. It was further ordered that the defendant pay the complainant $25.00 a week for her support, and also $10.00 a week for the child's support until the further order of the court.

The defendant makes two points for a reversal of this decree:

1. That the decree is contrary to the manifest weight of the evidence; and

2. That the court erred in not the

daughter of the defendant.

In the final order, it appears that the complainant was charged with the custody of three children, a

at the time the complainant came in July with the defendant in the

[illegible]

[illegible]

[illegible]

10, 1920, who is known as Martha Kovash and was acknowledge by the defendant to be his child. It appears from the evidence that the complainant was a married woman at the time she became the defendant's housekeeper; that her husband, John Vincenz Janzar obtained a divorce and the complainant thereafter married the defendant.

The evidence centers to a large extent around the treatment by the complainant of the defendant's children. The complainant admits that she inflicted punishment when necessary in order to correct the children's habits. There is also evidence that the defendant punished these same children. However reprehensible it may seem to some, still many persons believe in corrective measures in moderation by the parents to discipline children. This question of punishing children for wrong doing is not before this court except as it may corroborate the defendant in that the complainant materially contributed to produce the conditions which justified the separation, and that she was not altogether without fault. But those acts of the complainant would not justify the infliction of cruelty by the defendant upon the complainant.

There is evidence that on December 21, 1929, the defendant struck the complainant, and that on December 23, 1929, he ordered the complainant to leave the home, and since that time she has lived separate and apart from the defendant.

The court passed upon the evidence of several witnesses, and determined that the preponderance of the evidence justified the court in finding that the defendant had committed several acts of cruelty upon the complainant during their married life. The trial court, in passing upon the credibility and weight of the evidence, had the advantage of observing the witnesses in court.

evidence, but the advantage of observing the witnesses in court, in certain cases, is considerably and rightly of the opinion that the court should not interfere with the discretion of the trial judge upon the conflicting evidence.

The court cannot find that the defendant acted in good faith and therefore that the evidence of desertion was not justified.

The appeal is dismissed with costs.

Chitton Ltd. May 2nd, 1951

The evidence appears to a large extent around the defendant.

The petitioner, a married woman of the city of Chitton, obtained a divorce and the complainant thereafter married the defendant's housekeeper; that her husband, John Vincent Turner, the co-respondent was a married woman at the time she brought the petition to be his child. It appears from the evidence that the defendant was not aware of the petition for divorce and acknowledge by

The only means which this court has in considering the questions involved on appeal is from the abstract and briefs filed by the parties, and it is impossible to picture the appearance of the witnesses and their demeanor while on the witness stand in the presence of the trial judge. So unless it appears that the manifest weight of the evidence is against this decree, this court will not reverse the findings upon that ground.

We have considered the evidence and find that there is a conflict and certain discrepancies therein, yet the evidence sustains the court's findings, and we would not be warranted in disturbing the decree upon that ground.

The second and remaining question is the parentage of the child Martha Kovash. While the complainant was living and co-habiting with the defendant as the housekeeper, the child known as Martha Kovash was born on August 10, 1920. During the period when the complainant lived with the defendant, her husband, John Vincenz Janzar, never visited her, and as a matter of fact, was not in Chicago. It appears, however, that a divorce decree was entered on March 31, 1921, granting the relief prayed for in said bill of divorce filed by John Vincenz Janzar; that the complainant and the defendant were thereafter married and, except for several separations, lived together until the final separation took place and resulted in these proceedings.

There is evidence in the record that this child was acknowledged by the defendant as his own, lived at his home and was supported by him. The defendant knew that the child bore his name and that his name was attached to the baptismal certificate as the father and the complainant as the mother of Martha Kovash.

It is a question of fact for the court to determine whether or not the defendant is the father of Martha Kovash, The People v. Gleason, 211 Ill. App. 380. The court found from

The only means which exist now is constituting the committee
involved on appeal is from the electors and people filed in the
Parties, and it is impossible in dictate the conference of the
witnesses and their demeanor while on the witness stand is the
presence of the trial Judge. So courts it indicate that the
manifest weight of the evidence in support this Jacobs, this court
will not reverse the findings upon that ground.

So have considered the evidence and find that there is
a conflict and certain discrepancies therein, but the evidence
sustains the court's findings, and we could not be warranted in
disturbing the decree upon that ground.

The second and remaining question in the petitions of
the child Martha Craven. While the complainant was living and
co-habiting with the defendant as the husband, the child known
as Martha Craven was born on August 24, 1900. During the period
when the cohabitment that with the defendant, her husband, John
Vincent Lamar, never visited her, nor as a matter of fact, was
he in Orleans. It appears, however, that a divorce decree was
entered on March 27, 1901, granting the relief prayed for in said
bill of divorce filed by John Vincent Lamar; that the committment
and the detention into therapeutic hospital, except for several
several minutes, Miss Gallagher until the final determination
took place and resulted in three possibilities.

There is evidence in the record that this child was
copyrighted by the defendant as his own, lived as his home and
was subjected to his care and that the guilt bore his
name and that his name was attached to the baptismal certificate
as the father and the defendant is therefore of Martha Craven.

It is a question of fact for the court to determine
whether or not the interest in the father of Martha Craven,
The learned a. Gleason, 111 111. 289. The court found from

the evidence that this child was the child of the complainant and the defendant, and that finding is supported by the evidence. It would be a harsh rule to visit the sins of the parents upon this unfortunate child. From the record it appears that at no time did the defendant deny or dispute the parentage of Martha Kovash, and it was only questioned by the defendant when this proceedings was instituted. In Miller v. Pennington, 218 Ill. 220, the court said:

> "It seems to us that it would be an unjust and unwarranted construction of the law to say that the father of an illegitimate child, who has legitimated it by marrying its mother and acknowledged it to be his, can thereafter change its status by any subsequent declaration."

The decree is affirmed.

AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

the evidence that this child was the child of the complainant and the defendant, and that timing is supported by the evidence. It would be a bizarre rule to visit the sins of the parents upon this unfortunate child. Then the record is shorn that at the time old the defendant had or disputed the paternity of Baxter-Tarver, and it was only questioned by the defendant when this proceeding was instituted. In Miller v. Commissioner, 114 T.C. 350, the court said:

> "It seems to us that it would be an unjust and unwarranted construction of the law to say that the father of an illegitimate child, who has legitimized it by marrying its mother and acknowledged it to be his, can thereafter change transfers by any subsequent declaration."

The score is affirmed.

AFFIRMED.

RELEASED AND ISSUED, 02. COUNCIL.

35157

CHARLES HARRIS and KATHERINE HARRIS,

Appellants,

v.

PETER VLAHOS, et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

266 I.A. 604

Opinion filed May 4, 1932

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainants from the decree dismissing the complainants' bill of complaint for want of equity and granting the relief prayed for by the cross-complainants, Peter Vlahos and Nicholas Dranias, in their cross-bill of complaint.

The complainants filed an amended bill of complaint against the defendants to remove a certain declaration of forfeiture and certain articles of agreement for a warranty deed as a cloud upon the real estate described in the bill of complaint.

From the amended bill of complaint it appears that the complainants entered into a real estate exchange contract with the defendants Vlahos and Dranias, whereby the complainants agreed to exchange certain equities in real estate of the value of $30,000 and $5,000 in cash for the property of the defendants Vlahos and Dranias, known as the Cherry Farm, subject to a $5,000 first mortgage, and a $14,000 second mortgage and defendants were to secure and deliver a $19,000 third mortgage to cover the balance of the purchase price; that at the time the deal was to be closed, the defendants Vlahos and Dranias did not have the fee simple title to the premises, and therefore were unable to consummate the deal; that a new agreement was entered into between the parties, to the effect that the defendants Vlahos and Dranias were to convey whatever title they had, which was evidenced by certain articles of agreement

Opinion filed May 4, 1932

for warranty deed between the defendants and Nicholas Hildebrandt, one of the other defendants; that the deal was consummated on the 10th day of June, 1927, and the complainants conveyed their properties and $5,000 cash and the defendants Vlahos and Dranias executed an assignment of the said articles of agreement between these defendants and Nicholas Hildebrandt, which was consented to by, Hildebrandt; that at the time it was understood that the complainants upon adjustments were indebted to the defendants Vlahos and Dranias in the sum of $19,460, to be paid in semi-annual installments of $750 and interest; that six months after the deal had been consummated the first payment of $750 and interest became due. The complainants did not have the amount available and told these defendants Vlahos and Dranias that they would have the money within thirty days, and the defendants agreed to wait, but instead of waiting thirty days, immediately served a declaration of forfeiture, which declaration was recorded in the Recorder's Office of Du Page County, Illinois.

The defendants' answer is a general denial of the charges contained in the bill of complaint. The defendants Vlahos and Dranias filed their cross-bill of complaint making the complainants the cross-defendants, and as cross-complainants charge that the assignment of the complainants' contract for a warranty deed was not consented to by Nicholas Hildebrandt, the owner of the fee simple title to the property in question. They also charge that it was understood and agreed that when the cross-defendants, Charles Harris and Katherine Harris paid the $19,000, evidenced by the articles of agreement for a warranty deed, the parties would go to Hildebrandt and have him consent to the assignment to the complainants and cross-defendants of the agreement for a warranty deed between Hildebrandt and these cross-complainants; that although the assignment by these defendants on its face appears to be absolute, it was made merely to secure the conveyance of the property

to the cross-defendants, and not intended as an absolute assignment, The defendants therefore pray that the court so hold, and that the court further find that the articles of agreement evidencing the $19,000 be held as a valid and subsisting lien, and upon failure to pay said amount that the forefeiture be declared absolute.

Nicholas Hildebrandt answered the bill of complaint and the cross-bill, and admitted ownership of the property or real estate in question, and that he consented to the assignment.

Upon the issues being joined, this cause was referred to Adolph M. Kaster, a Master in Chancery of the Superior Court, who, having heard the evidence offered by the parties, filed a report of his findings and recommendations, together with a transcript of the evidence in said court.

The Master's findings and recommendations were, in substance, that the assignment in question was absolute and unconditional, between Vlahos and Dranias and the complainants, and was not a lien upon the real estate, and that such assignment be delivered up, cancelled and removed as a cloud upon the premises in question.

Objections were filed by the defendants Vlahos and Dranias, which were overruled by the Master in Chancery. These objections so filed were ordered by the court to stand as exceptions to the Master's report. During the hearing of the exceptions by the court it appeared that the premises in question had been damaged by fire; that an adjustment of the proceeds of the fire insurance was necessary, and the matter was referred to John W. Ellis, a Master in Chancery of this court for the purpose of hearing the additional testimony to be offered by the parties upon the amounts due under the terms of certain fire insurance policies, and also for the purpose of advising and assisting the Chancellor in

reviewing the record in the matter and restating the facts as disclosed by the proof heard by Master in Chancery Easter; that Master in Chancery Ellis, after hearing additional testimony, filed his report;that Complainants' counsel appeared before Master Ellis and examined and cross examined witnesses, and thereafter the court entered an order requiring the complainants to deposit certain moneys with the Master in Chancery to apply on account of costs, to which the complainants filed their objections, which were allowed to stand as exceptions to the report of Master Ellis.

The exceptions filed by the defendants Vlahos and Dranias to the report of Master in Chancery Easter were heard and sustained by the court, and thereupon a decree was entered, based upon the original report, the proofs and evidence contained in Master Easter's report.

The decree of the court finds that the complainants have failed to prove the charges contained in the bill of complaint, and decrees that said bill be dismissed for want of equity; that the equities are with the cross-complainants Vlahos and Dranias and against the cross-defendants, Charles Harris and Katherine Harris, and that the material allegations contained in the cross-bill of complaint are true, and that the decree finds that on the 13th day of May, 1927, the complainants and defendants, Vlahos and Dranias, entered into a written contract with each other for the delivery of certain real estate, and that at the time of the closing of the deal it appeared that there was a balance of $19,460 due upon adjustment from the complainants to the defendants Vlahos and Dranias.

In the decree it appears that the court determined from all of the documents and evidence in the record that said assignment in question between the parties was delivered conditionally to the complainants and cross-defendants; that upon the complainants and cross-defendants complying with their contracts with the cross-complainants Vlahos and Dranias, they would acquire the interests

of the cross-complainants Vlahos and Dranias in and to a contract of purchase with Hildebrandt, and that they, Vlahos and Dranias, have an equitable lien upon the premises in question.

The rule is that a master in chancery is merely an aid to the court, and his findings and recommendations are merely advisory, and where the findings and recommendations of the master are manifestly against the weight of the evidence the Chancellor is not only empowered to overrule the findings and recommendations of the master and enter a decree in conformity with the proof, but as a matter of duty, should do so.

It is admitted by the original complainants that the only issue in this case is whether or not the assignment of the articles of agreement for a warranty deed is absolute and unconditional, or was only given to secure the performance by the defendants and cross-complainants of the conditions provided for in the contract.

We have carefully examined the record and find that there is evidence that the assignment by Vlahos and Dranias of the real estate contract to the complainants was not absolute. When the parties met on June 10, 1927, to consummate and perform according to the terms of the contract in question, it appears that Vlahos and Dranias did not have title to the land described in the contract, but had an equitable title by virtue of a contract for a warranty deed, and that the complainants for that reason did not execute and deliver to Vlahos and Dranias a trust deed securing the balance of $19,460, subject to two prior trust deeds. It was then agreed that the complainants should convey the real estate described in the contract and owned by them, to Vlahos and Dranias, they to pay them $5,000, and that Vlahos and Dranias should assign to the complainants their contract with Hildebrandt for a warranty deed to the Cherry Farm, the complainants to pay to Vlahos and Dranias

of the cross-complainants Tingey and Trotter in and to a contract of purchase with Hildebrandt, and that they, Tingey and Trotter, have an equitable lien upon the premises in question.

The rule is that a vendor in ejectment is merely ex rel to the court, and his findings and recommendations are merely advisory, and while the findings and recommendations of the master are entitled ordinarily to the highest consideration, and are manifestly against the weight of the evidence the Supreme Court is not only empowered to examine the findings and recommendations but is a matter of duty, should it so.

of the master and ought to be overruled in accordance with the right, but

It is admitted by the original cross-complainants that the only issue in this case is whether or not the cross-complainants are entitled to specific performance of the contract, or whether said contract is void for the reason that the cross-complainants at the conclusion of the testimony stricken out the words "and Trotter", or was only given to secure the performance by the cross-complainant Tingey.

We have carefully examined the record and find that there is evidence that the assignment by Tingey and Trotter of the real estate contract to the complainants was not absolute. That the parties met on June 10, 1904, to consummate and understand the terms of the contract in question, it appears that Tingey and Trotter did not have title to the land described in the contract, and had no contingent title by virtue of a contract for purchase of $3,400, subject to two prior trust deeds. It was then agreed that the complainants should convey the real estate described in the abstract and deliver it Tingey & Trotter deed securing the balance of $3,000, and that Tingey and Trotter should assign to the Quarry Land Company to pay to Tingey and Trotter

the unpaid balance of $19,460, in semi-annual payments of $750 and interest.

It is evident that the question of securing the conveyance of the farm to the complainants by Vlahos and Dranias and that the complainants made the payment of $19,460 in installments to Vlahos and Dranias, was in the minds of the parties at the time of the transaction. There is evidence in the record which supports the Chancellor's findings that the assignment of the contract for a warranty deed with Hildebrandt by Vlahos and Dranias to the complainants was conditional, and the evidence is conclusive that the complainants have failed to pay any part of the $19,460 to Vlahos and Dranias.

The complainants contend that the court's decree is predicated upon the advisory report of Master Ellis upon evidence heard by Master Easter. Master Easter filed a complete report with his recommendations and the transcript of the evidence heard by him. The decree clearly indicates that Master Easter's report and the evidence attached thereto was the only report considered by the Chancellor in making the findings that are incorporated in the decree. This is not a case where a proceeding in chancery was referred by the court to a Master in Chancery to take proofs and report his conclusions upon the law and the facts which were heard in part only by the Master. Evidence so taken cannot be considered by a Master in Chancery upon a re-reference, for the reason that the witness was not present and the evidence was not properly before the Master.

The question is raised by the complainants as to the propriety of the Court's order requiring that the complainants deposit $100.00 with Master Ellis to apply on account of costs. The method of securing the payment of costs upon a reference to a Master in Chancery is not to be extended beyond the provision of

the unsaid balance of $14,460, in semi-annual payments of $720 and interest.

It is evident that the question of executing the conveyance of the farm to the complainants by Simon and Jeanne was what the complainants made the express of $12,480 in installments to Simon and Jeanne, was in the minds of the parties at the time of the transaction. There is evidence in the record which suggests the Chancellor's finding that the assignment of the instrument for a nominal deed with differentials by Simon and Jeanne to the complainants was equitable, and the evidence is conclusive that the complainants have failed to pay any part of the $14,460 to Simon and Jeanne.

The complainants contend that the court's decree is predicated upon the evidence heard at Easter Term when evidence heard by Easter Master. Master Easter filed a complete report with his recommendations and the transcript of the evidence heard by him. The decree clearly indicates that Master Easter's report and the evidence adduced thereto was the only record considered by the Chancellor in making the findings that are incorporated in the decree. This is not a case where a transcript is ordered and evidence taken in the court in a matter in Chancery to take effect but the court is a master by the master. Evidence may either be submitted by a deputations upon the law and the light which each bears in mind by the master. Evidence may either be submitted by a witness who can testify and the evidence was not heard by Master Easter in Chancery Term but by a master, for the court to take action upon the report of the master.

The question is raised by the complainants as to the authority of the court's order requiring that the complainants deposit $100.00 with master Ellis to supply on account of costs. The method of securing the payment of costs upon a reference to a master in Chancery is not to be exclusively derived from statutes or

the statute, and it is not proper for a court to enter an order to compel a litigant to advance costs to the Master. Barringer v. Collins, 337 Ill. 306.

The complainants and cross-defendants were not denied an opportunity to offer evidence, or the right to cross examine witnesses, notwithstanding this order that was entered by the court. The complainants sought affirmative relief and upon their motion the case was referred to Master in Chancery Easter. They were allowed to introduce evidence, before Master Ellis, to whom the case was referred to take proofs and make a report and recommendations regarding the disposition of moneys due upon fire insurance policies. The Master made a specialreport that the Master's attention had been called to an order requiring the complainants to deposit with the Master $100 prior to a further hearing. No deposit of any amount was made by the complainants, and no request was made for a further hearing before the Master. It does not appear from the record that the complainants asked for leave to cross examine witnesses, nor made an offer to prove facts by witnesses, and were denied by the Master.

It is also urged by the complainants that the court erred in denying a change of venue; that a petition which conformed to the statutory provisions was presented to the court, charging that the court was prejudiced and could not give the complainants a fair trial. We have examined the abstract of record and are unable to find that the petition was filed, or that a certificate of evidence was signed and filed by the trial court, and not being preserved, the question is not properly before this court.

The defendants Vlahos and Dranias have called to our attention the fact that the hearings upon the reference before Master Easter were held in the office of the solicitors for the

the statute, and it is not proper for a court to order on motion to
compel a litigant to advance costs to the master. Whitney v.
Griffing, 327 Ill. 304.

The complainants and cross-defendants were not denied
an opportunity to offer evidence, at the right in cases previous
witnesses, notwithstanding this order that was entered by the court.
The complainants sought affirmative relief and upon their motion
the case was referred to Master in Chancery Taylor. They then
elected to introduce evidence, before Master Tilly, in spite the
case was referred to Mate (sic) who made a report and recommen-
dations regarding the dismissal of counts the upon fire insurance
policies. The Master made a specific that the insurer
attention had been called to in order regarding the complainants
to deposit with the Master $100 prior to a further hearing. No
deposit of any amount was made by the complainants, and no
request was made for a further hearing before the Master. It
does not appear from the record that the complainants asked for
leave to cross-examine witnesses, nor made an offer to prove facts
by witnesses, not appearing by the Master.
make

It is also urged by the complainants that the court
erred in denying a change of venue; that a petition which contained
to the statutory declaration was presented to the court, charging
that the court was prejudiced and would not give the complainants
a fair trial. We have examined the abstract of record and are
unable to find that the petition was filed, or that a certificate
of merit before was stated (as filed by the trial court, and not until
presented, the motion is not properly before this court.

The interlocutory decree and counter bond called in our
attention the fact that the insurance upon the mortgage under
which the complainants claim was not in force at the time of the
fire. The complainants claim that the insurance was renewed by
parol, but it is not proper for a court to order on motion to

complainants, who also prepared the Master's report. This matter is not properly before the court because it is not made a part of the record, and it will not be necessary to pass upon it.

Having carefully considered the objections made by the complainants, we are unable to agree with their contention that the error in the record is sufficient to warrant a reversal. The decree is therefore affirmed.

DECREE AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

35340

ANTONIA BUDOVICH,

Appellee,

v.

STANDARD OIL COMPANY, INDIANA, a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

266 I.A. 604

Opinion filed May 4, 1932

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is a suit for damages instituted by Antonia Budovich, the plaintiff, against the Standard Oil Company (of Indiana), the defendant, for injuries sustained by her on December 14, 1928, at the intersection of 83nd Street and Western Avenue, Chicago, through the alleged negligent, willful operation of a certain Ford truck which ran into and against the said plaintiff on that day. Trial was had, and at the close of the evidence the jury returned a verdict of $21,000 in favor of the plaintiff. Thereafter the plaintiff filed a remittitur of $6,000, and the court entered judgment for $15,000, from which the defendant filed its appeal.

The declaration consists of three counts. The first charges general negligence; the second negligence in the driving of the automobile in question at a high and dangerous rate of speed, contrary to the statute; and the third, willfulness and wantonness, the pertinent averments being that the defendant operated its motor vehicle willfully and wantonly, so that in consequence thereof it was then and there caused, allowed and permitted to and did then and there run with great force and violence against the plaintiff.

The defendant filed a plea of not guilty, and at the conclusion of all the evidence the defendant requested the court to instruct the jury to find the defendant not guilty, which was denied. Thereupon various instructions were given at the plaintiff's

Opinion filed May 4, 1932

and defendant's request, and the jury returned a general verdict of guilty, and assessed the plaintiff's damages at $21,000, and in addition thereto, answered "Yes" to the following interrogatory submitted by the defendant:

> "Did the defendant on or about the 14th day of December, 1928, at or near the intersection of Western Avenue and 22nd Street, in the City of Chicago, County of Cook and State of Illinois, willfully and wantonly manage, drive, control, run and operate its motor vehicle, as alleged in said declaration?"

The defendant contends that the declaration in this case will not sustain a finding of willfulness and wantonness.

The allegation in the third count of the declaration is, in part, that the defendant owned, operated and drove a motor vehicle north along Western Avenue at the intersection of 22nd Street in Chicago while the plaintiff was then and there upon and in the act of crossing Western Avenue, or near the intersection. The defendant, through its agent, "then and there willfully and wantonly managed, drove, controlled, ran and operated its motor vehicle," so that in consequence thereof it was then and there caused to and did run and was driven with great force and violence against the person and body of the plaintiff. It appears that the allegation is for willful and wanton driving of the defendant's automobile by its agent, and the car "was propelled and driven with force and violence" against the plaintiff, causing the injuries complained of. It necessarily follows as alleged that the injuries were caused by such willful and wanton act. This allegation is complete and is not subject to the objection called to our attention that there was a willful and wanton driving, but not a willful and wanton injury. The third count is a sufficient count after verdict, to sustain the judgment.

and defendant's request, and the jury returned a Special Verdict at
Entry, and assessed the plaintiff's damages at $21,000, and in
addition thereto, answered 'Yes' to the following interrogatory
submitted by the defendant:

> "Did the defendant on or about the 15th day of December,
> 1948, at or near the intersection of Fourth Avenue and
> Grand Street, in the City of Chicago, County of Cook and
> State of Illinois, willfully [illegible] drive, drive,
> in said described [illegible]
> control, the and operate the motor vehicle, as alleged
> in

The defendant contends that the declaration in this
case will not sustain a finding of willfulness and wantonness.

The allegation in the third count of the declaration
is, in part, that the defendant owned, operated and drove a motor
vehicle north along Western Avenue at the intersection at 47th
Street in Chicago while the plaintiff was then and there upon
in the act of crossing Western Avenue, or near the intersection.
The defendant, through its agent, "then and there willfully and
wantonly managed, drove, controlled, ran and operated the motor
vehicle," so that in consequence thereof it was then and there
caused to and did run and was driven with great force and violence
against the person and body of the plaintiff. It appears that an
allegation in for willful and wanton driving of the defendant's
automobile by its agent, and the car "was managed and driven
with force and violence against the plaintiff," covered the injuries
complained of. It necessarily follows as alleged that the injuries
were caused of such willful and wanton act. This allegation in
complaint and is not required in the opinion cited by our attorney
that there was a willful and wanton driving, but not a willful and
to sustain the judgment.

The third count is a multifarious count after another,
motion injury.

Prior to the trial in the instant case the willful and wanton count was not questioned by the defendant, and it necessarily follows that although this count might have been fatal on demurrer, it was cured by the verdict. In the case of B. & O. S.W. Ry.Co. v. Keck, 185 Ill. 400, it was held to be the rule that:

> "Defects and omissions in pleadings, in substance or form, which would have been available on demurrer, are cured by verdict, where the issues joined are such as necessarily require proof of the facts so defectively presented, and without which proof it is not to be presumed the court would have directed or the jury returned the verdict."

And further, the jury was instructed by the court at the request of the defendant as to the necessity of a belief from the evidence, "that the defendant, by its agent, drove said automobile with such reckless disregard for the rights of others as to amount to an intention to inflict the injuries complained of."

And further, willful and wanton acts are defined by the court in this instruction in these words, "By willful and wanton is meant such reckless disregard of the rights of others as to amount to an intention on the part of the defendant to produce the injuries complained of." The jury was fully instructed as to the necessity of evidence to establish the fact that the injuries were inflicted by willful and wanton acts, and the jury, under the proof in the record, found by affirmative answer to the interrogatories of the defendant, that the defendant did willfully and wantonly manage, drive, operate and run its motor vehicle as alleged in the declaration, and caused the injuries complained of.

It is further contended by the defendant that the judgment should be reversed for the reason that the general verdict is contrary to the special finding of fact made by the jury, as it is obvious that the jury determined its verdict upon the theory of willfulness and wantonness. The verdict cannot be saved upon

of willfulness and recklessness. The verdict cannot be saved upon
the theory that the jury interpreted its verdict upon the theory
of the contrary to the plaintiff's pleading of fact made by the jury, as it
judgment should be reversed for the reason that the general verdict
was ambiguous in that it failed to show whether the jury found the
defendant guilty of willfully and wantonly causing the injuries
complained of, but caused the injuries complained of.

It is further contended by the defendant that the
defendant, after the defendant did willfully and wantonly cause,
record, found by affirmative answer to the interrogatories of the
by willful and wanton acts, and the jury, under the proof in the
of evidence to establish the fact that the injuries were inflicted
complained of." The jury was fully instructed as to the necessity
to an invasion on the part of the defendant to produce the injuries
court in this instruction in these words, "By willful and wanton is
And further, willful and wanton acts are defined by the
intention to inflict the injuries complained of."
"that the defendant, by its agent, drove said automobile with such
the defendant as to the necessity of a relief from the evidence,
And further, the jury was instructed by the court at the request of

> "Defects and omissions in pleadings, in substance or form,
> which would have been available on demurrer, are cured by
> verdict, where the issues joined are such as necessarily
> require proof of the facts so defectively presented, and
> without which proof it is not to be presumed the court
> would have directed or the jury returned the verdict."

Prior to the trial in the instant case the willful and
wanton count was not questioned by the defendant, and it necessarily
follows that although this count might have been tried on demurrer,
it was cured by the verdict. In the case of C. & O., S.L., Ry.Co. v.
Leak, 162 Ill. 470, it was held to be the rule that:

the theory that the facts justify a finding of mere negligence.

The rule which applies in the instant case is that evidence is not necessary to show that the defendant with malice aforethought and with premeditation brought about the injuries. Gross negligence may justify the presumption of willfulness or wantonness when it is such as to imply a disregard of consequences. It need not be claimed, nor is the plaintiff required to prove that there was a particular intention to injure, but the evidence must show that there was such willful or wanton recklessness as to authorize the presumption of a total disregard of the rights of others, and the question to be determined by the jury is whether the negligent conduct of the defendant amounts to wantonness and willfulness. Williams v. Kaplan, 242 Ill. App. 166.

The Supreme Court in the case of Bremer v. L. E.&W.RR.Co. 318 Ill. 11, in discussing the evidence showing gross want of care, said:

> "If there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury, then it is a question to be determined by the jury whether the negligent conduct of the defendant amounted to wantonness or willfulness. (Walldren Express Co. v. Krug, 291 Ill. 472.) What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement. The gross negligence which will justify the presumption of willfulness or wantonness is such as to imply a disregard of consequences or a willingness to inflict injury. (Lake Shore and Michigan Southern Railway Co. v. Bodemer, supra.) An intentional disregard of a known duty necessary to the safety of the person, and an entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness such as charges the person whose duty it was to exercise care with the consequences of a willful injury. (1 Thompson on Negligence, secs. 20, 22.)"

It is evident that when the accident happened to the plaintiff at 7:30 at night there was a gross want of care on the part of the defendant's driver at the time plaintiff was crossing

the theory that the facts justify a finding of more negligence.

The rule which applies in the instant case is that evidence is not necessary to show that the defendant with malice aforethought and with premeditation brought about the injuries. Gross negligence may justify the presumption of willfulness or wantonness when it is such as to imply a disregard of consequences. It need not be claimed, nor in the plaintiff required to prove that there was a malicious intention to injure, but the evidence must show that there was such willful or wanton recklessness as to authorize the presumption of a total disregard of the rights of others, and the question to be determined by the jury is whether the negligent conduct of the defendant amounts to wantonness and willfulness. Williams v. Kaplan, 241 Ill. App. 180.

The Supreme Court in the case of Yonker v. C. & E.Ill.R.Co. 315 Ill. 11, in discussing the evidence showing gross want of care, said:

> 'If there is any evidence in the record fairly tending to show such a gross want of care as to imply a willful disregard of consequences or a willingness to inflict injury, then it is a question to be determined by the jury whether the negligent conduct of the defendant amounted to wantonness or willfulness. (Illinois Terminal Co. v. Tuke, 201 Ill. 171.) That degree of negligence that is sometimes equivalent to a willful or wanton act is so hard to define as negligence itself, and in the nature of things is an element upon the particular circumstances of each case so as to be susceptible of general statement. The great negligence which will justify the presumption of willfulness or wantonness is such as imply a disregard of consequences or a willingness to inflict injury. (Lake Shore and Michigan Southern Ry. Co. v. Bodemer, supra.) In intentional disregard of a known duty necessary to the safety of the person, and an active obedience of duty for the sake, the person or the property of others, such as exhibits a conscious indifference to consequences, mixes a dose of constructive or legal willfulness such as charges the person whose duty it was to exercise care with the consequences of a willful injury. (Lake Shore and Michigan Southern Ry. Co. v. Bodemer, supra.)'

It is evident that when the accident happened to the plaintiff at 7:30 at night there was a great want of care on the part of the defendant's driver at the time plaintiff was crossing

the intersection at Western Avenue and 22nd Street. At that point automatic stop and go lights were installed and in operation for the purpose of regulating traffic, and as a matter of common knowledge the display of the red light indicates that the traffic shall stop, the green light, that the traffic shall move forward, and the amber, a change of signals. When the plaintiff was at the intersection and saw the green light she started to cross the street and did not see the defendant's car until it was within four feet coming fast and she was struck by the defendant's car west of the north cross walk of 22nd Street and thrown a distance of 35 feet, and when we consider that her weight was 190 pounds, the automobile must have been moving at a considerable speed. That is self-evident when it is considered that the defendant's car was running on a wet and slippery pavement and ran 50 to 60 feet after striking the plaintiff and stopped when the car collided with a post. There is conflict in the evidence as to the speed of the car at the time of the accident. The testimony ranges from 10 to 45 miles an hour. There is also evidence to the effect that the speed of the automobile was limited by a governor on the car to 20 miles an hour. The operation and speed of the automobile are questions for the jury.

The evidence before the jury fairly tends to prove a gross want of care and a willful disregard of the circumstances by the defendant's agent in the operation of its automobile at the place of the accident. The jury having determined that the negligent conduct of the defendant amounted to wantonness by the answer of the defendant to special interrogatories, the evidence in the record is sufficient and meets the requirement as to proof and the law as laid down in Bremer v. L. E. & W. R. R. Co., supra.

There is further evidence in the record, which was considered by the jury, to the effect that the acts of the defendant

considered by the jury, to the effect that the acts of the defendant
down in Kramer v. [illegible], supra.

There is further evidence in the record, which was sufficient and meets the requirement as to proof and the law as laid down in Kramer v. [illegible], supra.

conduct of the defendant described to witnesses by the owner of the place of the accident. The jury having determined that the negligent by the defendant's error in the operation of its automobile at the a prima facie proof of due and a willful disregard of the circumstances

The evidence relied the jury fairly tends to prove for the jury.

an hour. The operation and speed of the automobile are questions of the automobile was limited by a governor on the car to 30 miles miles an hour. There is also evidence to the effect that the speed at the time of the accident. The testimony ranges from 10 to 45 post. There is conflict in the evidence as to the speed of the car striking the plaintiff and stopped when the car collided with a running on a wet and slippery pavement and ran 30 to 40 feet after is self-evident when it is considered that the defendant's car was the automobile must have been moving at a considerable speed. That of 25 feet, and when we consider that her weight was 130 pounds, west of the north cross walk of 32nd Street and thrown a distance four feet coming East and she was struck by the defendant's car street and did not see the defendant's car until it was within intersection and saw the green light she started to cross the and the amber, a change of signals. When the plaintiff was at the point automatic stop and go lights were installed and in operation for the purpose of regulating traffic, and as a matter of common knowledge the display of the red light indicates that the traffic shall stop, the green light, that the traffic shall move forward, the intersection at Eastern Avenue and 32nd Street. At that

by its agent were such gross negligence as to imply a disregard of consequences when the Ford in question was driven through the intersection at the place of the accident at the time the amber signal light was displayed. In other words, when the defendant's agent did not have the right of way.

The defendant urges that the verdict is excessive and that the plaintiff's remitting $6,000 did not save the verdict, and contends that the jury was swayed by some influence other than a fair consideration of the evidence.

From the record it appears that after the plaintiff arrived at the Cook County Hospital her personal history was obtained from her by Dr. L. H. Berard, an interne. A physical examination disclosed evidence of a broken right clavicle, possible fracture of fibula or tibia, lacerations above the right eye and contusions at various places on the body. The patient was conscious. No X-ray was available at the time she was brought to the County Hospital, and according to Dr. Berard's findings, the cut over the right eye was sutured. Dr. O'Malley, who was senior interne and checked the findings of Dr. Berard, found the patient conscious and ordered immobilization of the right clavicle and a posterior mold splint for the right leg. Thereafter X-rays were taken, from which it appeared that the fibula and not the tibia was fractured within a few inches of the knee, and the right clavicle was fractured near the upper end of the medial third, one end of the clavicle overriding the other about an inch and a half, the X-ray showing small spicules or hair-like pieces of the clavicle adhering to the upper piece, the right shoulder sagging downward and forward. During the time the plaintiff was in the County Hospital she became restless and tried to get out of bed, and finally, on December 21, 1928, she insisted upon going home. No objection was made by the hospital authorities, and an ambulatory bandage was placed upon

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the right shoulder, and the right leg was in such condition that it could be moved about. She was taken to her sister's apartment, and from there removed to her own home, which was on the third floor of the building located at 47th Street and Campbell Avenue, and thereafter treated by Dr. Davidonis, a graduate and lecturer at the Chicago Medical School; and a member of the staff of the Washington Park Hospital.

The plaintiff was later taken to the Holy Cross Hospital and an operation was performed. The clavicle was shortened about an inch. The muscles of the right hand are weak, indicating atrophy, and there is 75% loss of motion of the right shoulder. The degeneration of the nerves controlling the muscles of the right hand cause a tremor, which condition will grow worse. There is evidence of concussion, indicated by dizziness; some impairment of the sight of her right eye, and also impairment of the hearing of the right ear.

We have reached the conclusion that the injuries sustained by the plaintiff were sufficient to warrant the recovery of the amount of the judgment entered by the court, and that the amount is not excessive for the injuries sustained.

The defendant complains of acts of conduct which occurred during the trial as a deliberate attempt to arouse the passions of the jury in favor of the plaintiff. Upon an examination of the questions complained of, we find that upon objections made by the defendant the court usually sustained the defendant's position, and we quite agree with the defendant that the effect of the questions upon the jury is but a mere guess, and that it was hard to determine whether such conduct of the plaintiff was prejudicial, However, we do not believe that the jury was unduly swayed and prejudiced against the defendant.

The Court's denying the admissibility of the hospital record in evidence is urged as error by the defendant. It appears

the right shoulder, and the right leg was in weak condition that it could be moved about. She was taken to Dr. Kinney's treatment, and from there removed to her own home, which was on the third floor of the building located at 47th Street and Campbell Avenue, and thereafter treated by Dr. Davidonis, a graduate and locumtor at Hamilton Park Hospital.

The plaintiff was later taken to the Holy Cross Hospital and an operation was performed. The clavicle was shortened about an inch. The muscles of the right neck are cut, instepting through, and there is 75% loss of motion of the right shoulder. The abduction of the neuron constituting the meaning of the right hand cause a tremor, which condition will time retain. There is evidence of concussion, indicated by dizziness; some impairment of the sight of her right eye, and also impairment of the hearing of the right ear.

On part remand the conclusion that the injuries sustained by the plaintiff were sufficient to warrant the recovery of the amount of the judgment entered by the court, and that the amount is not excessive for the injuries sustained.

The defendant's demolition of some of component which contained during the trial as a deliberate attempt to remove the questions of the jury in favor of the plaintiff. Some examination of the questions contained, as that there were objections made by the defendant the court recently instructed the defendant's counsel, and as quite there with the following that the client of the

However, as do not believe that the jury are mainly misled and to exercise another such judgment of the plaintiff was inadequate, sometimes known the jury in such a case finds, and this is the proof distinct against the interest.

The court's learning the materiality of the complaint

record in evidence is moved to strike by the defendant. It appears

that Drs. Berard and O'Malley, and Miss Gordon, a nurse, at the Cook County Hospital, testified, in substance, to the facts contained in the record, but the defendant urges that the records were properly admissible, not as evidence of the facts stated in the record, but as corroboration of the testimony of the three witnesses. While the record is the original hospital record and some of the entries were testified to by the witnesses as accurate entries made by them, still there is a lack of proof as to the accuracy of all of the entries. Therefore, the records were not properly admissible in evidence until there was a proof of their correctness. Wright v. Upson, 303 Ill. 120.

The defendant contends that the court erred in not giving defendant's requested instruction at the close of the evidence to find the defendant not guilty. The trial court was justified in its refusal for the reasons expressed by us in this opinion to the effect that the proof warranted the submission to the jury.

The court instructed the jury, at the plaintiff's request, to the effect that the plaintiff must prove by a preponderance of the evidence that at the time of her injury she was in the exercise of ordinary care and was injured by the negligence of the defendant. This the defendant contends was erroneous because of inconsistent counts of negligence and of wanton and willful conduct, and therefore a general verdict of guilty cannot be sustained upon the proof of mere negligence. At the defendant's request, the trial court instructed the jury that the plaintiff in order to recover from the defendant must prove by a preponderance or greater weight of the evidence that she was at the time of the accident exercising ordinary care, and that the defendant was guilty of the negligence charged in some counts of the declaration. Other of the defendant's instructions are to the same effect. The defendant is not permitted at this time to complain of the plain-

tiff's instructions when the defendant requested the court to give instructions of like import. The defendant must be consistent, and cannot complain in the Appellate Court that the ruling of the trial court was erroneous when such ruling was invited by the defendant. Sheridan v. City of Chicago, 175 Ill. 421.

Two instructions were tendered by the defendant and refused relative to the defendant's theory that the plaintiff by her own wrongful conduct unnecessarily aggravated and increased her injuries. The court did instruct the jury at the defendant's request that the plaintiff was required to prove by a preponderance of the evidence not only that the ailments existed, but that they were the result of the accident; that the jury cannot allow any recovery for ailments not the result of the accident, or guess that an ailment complained of by the plaintiff was the result of the accident, which instruction, in our opinion, covers the two refused instructions requested by the defendant.

Having examined the record, we condlude that there is no error such as would justify a reversal. The judgment is accordingly affirmed.

AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

trial's instructions when the defendant requested the court to give
and cannot complain in the Appellate Court that the failing of the
instructions of like import. The defendant must be content"
trial court has extraneous ones which failing was invited by the
defendant. Chastain v. Bldg. of Chatom, 119 Ill. 497.

The instructions were tendered by the defendant and
refused relative to the defendant's theory that the plaintiff by
her own wrongful conduct unnecessarily aggravated and increased
her injuries. The court did instruct the jury as the defendant's
counsel that the plaintiff was required to take by a reasonable
use of the evidence not only that the witness existed, but that they
were the result of the accident; that the jury cannot allow only
recovery for elements not the result of the accident, or guess
that an element complained of by the plaintiff was the result of
the accident, which instruction, in our opinion, covers the two
refused instructions tendered by the defendant.

Having examined the record, we conclude that there is
no error such as would justify a reversal. The judgment is
accordingly affirmed.

AFFIRMED.

Smith, P.J., concurs.

35314

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

GENERO ROBERTA,

Plaintiff in Error.

WRIT OF ERROR TO

CRIMINAL COURT

COOK COUNTY.

63

266 I.A. 604

Opinion filed May 4, 1932

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant was indicted, charged with carrying a concealed weapon. A jury was waived, and at the close of the evidence the court found the defendant guilty and sentenced him to one year imprisonment in the House of Correction, and imposed a fine of $300 and costs. Judgment was entered thereon.

The defendant does not question the sufficiency of the indictment, but contends that his arrest was illegal; that no offense was committed in the presence of the police officers that would justify searching the defendant and placing him under arrest; that the court erred in denying the defendant's motion to suppress the evidence taken from him by an illegal search and in denying defendant's motion for probation.

From the evidence it appears that police officers raided a house of ill fame, where the defendant was arrested. From the girl inmates of the premises at the time the police officers arrested them, and upon information obtained from the women that a couple of sluggers were in the premises, the police officers proceeded downstairs to a store room. Police officer Levine testified that when the witness and officer Sherping went into the store, three men were seated there; that Officer Sherping said to the men, "We are police officers, stand up;" that the three men, including the defendant, would not stand up, so Officer Sherping grabbed one of them and the witness grabbed and searched the defendant and

1931A

ILLINOIS,

Defendant in Error,

v.

DENNIS KOMARIC,

Plaintiff in Error.

Opinion filed May 4, 1933

MR. JUSTICE DUNN delivered the opinion of the court.

found a gun in his possession, which the officer identified at the trial.

Defendant Roberts testified and admitted that he was carrying a gun at the time of his arrest; that he lived in a room upstairs in the premises over the so-called Emery Athletic Club at Chicago Heights; that he paid his room rent, and had his clothing and other personal attire in the room. He also testified that he was downstairs in the store to take a shower bath, and that he carried the revolver at the time; that his reason for carrying the gun was, "Because there was a fellow shot not long ago." The arrest of the defendant was made by the police officers without a warrant. However, upon information obtained from the women, who were admittedly inmates of this house of prostitution, that certain men were in the store as sluggers and inmates of this house, the officers found the men, and they had reasonable ground to believe that the defendant had committed a crime. The defendant was seized and searched. From the facts in the record, we are of the opinion that the officers made an arrest which was justified by the law. The law which applies in this case is that an officer may arrest a person without a warrant if he has reasonable grounds for believing that the person arrested has committed a crime. People v. Guthman, 211 Ill. App. 373, People v. Caruso, 339 Ill. 268, North v. The People, 139 Ill. 81. The defendant relies largely upon the case of The People v. McGurn, 341 Ill. 632, as an authority that the court erred in not supressing the evidence obtained by the police officer from a search of the defendant. The court in that case approved the rule that has been the law in this state when it said:

> "Where a crime has, in fact, been committed and an arrest is made by an officer who has reasonable ground for believing that the person arrested is implicated in the crime, such officer has a right to search the person arrested

found a gun in his possession, which the officer identified at the trial.

Defendant thereafter testified and admitted that he was carrying a gun at the time of his arrest; that he lived in a room rented in the premises over the co-ed[illegible] Chinese Delight; that he had his room key, and had his clothing and other personal effects in the room. He also testified that he was employed in the store to help a Chinese lady, and that he entered the store at the time; that six others were present; and that he noticed the defendant and made by the police officers a search. Thereafter, upon information obtained from the owner, who were apparently ignorant of this phase of prosecution, that certain men were in the store to eliminate and investe of this nature, the officers found the gun, and they were apprehended [illegible] the defendant was advised and [illegible] a crime. The defendant was advised and [illegible] that the person arrested has committed a crime. [illegible], 281 Ill. App. 347, [illegible] v. [illegible], 318 Ill. 308, [illegible] v. The People, 128 Ill. 81. The statutes which [illegible] make the [illegible] of the crime [illegible] Ill. 111. [illegible] v. [illegible], 281 Ill. 347, [illegible] v. [illegible], 318 Ill. 308, [illegible] v. The People, 128 Ill. 81. The statutes which [illegible] make the [illegible] of the crime [illegible] person without a warrant if he has reasonable grounds for believing the law which [illegible] in this case is that an officer may arrest a person without a warrant if he has reasonable grounds for believing that the person arrested has committed a crime. [illegible] v. [illegible], 281 Ill. App. 347, [illegible] v. [illegible], 318 Ill. 308, [illegible] v. The People, 128 Ill. 81. The statutes which [illegible] make the [illegible] of the crime [illegible] crime, and officers may [illegible] upon reasonable cause to believe [illegible] is guilty of a felony [illegible] [illegible] arrest in which [illegible] [illegible] [illegible]

> without a search warrant, and in such case the right of search and seizure is incidental to the right of arrest.'

This expression by the Supreme Court does not militate against the arrest which was made in this case, but on the contrary the facts justify the arrest of this defendant. The officers had the information that the defendant, together with other persons, was engaged in and operating a house of ill fame, a crime under the statutes of the State of Illinois, Chap. 38, Par. 145 Sec. 57, Cahill's (1931) Rev. Stats. It was obvious to the officers that a crime was being committed, and the officer was justified in making the arrest and the subsequent search of the defendant. People v. Caruso, supra.

The defendant complains that the court erred in denying the defendant's motion for probation without investigation. The trial court had the parties and the subject matter before it, and had full authority to enter judgment. The defendant is not entitled to probation as a matter of right, and his release on probation rests in the sound discretion of the court. People v. Miller, 317 Ill. 33. There is nothing in the record which would justify this court in questioning the discretion exercised by the trial court in denying the defendant's motion.

We believe that the court did not err in denying defendant's motion to suppress the evidence, and that the court was fully justified in entering its order of commitment. Therefore, the judgment is affirmed.

AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

It was
Par. 145

35364

64

ERICK BLAINE THELIN,
Appellant,

v.

WILLIAM G. BARCLAY,
Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

266 I.A. 604

Opinion filed May 4, 1932

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from a decree dismissing the complainant's bill of complaint for want of equity. The complainant's bill alleges the formation of a partnership between the complainant and the defendant; that the same still exists, and prays for a partnership accounting. The answer of the defendant to this bill of complaint denies that such partnership still exists, and denies the complainant's right to relief. Upon the issues being joined the case was referred to a Master in Chancery of the Superior Court.

The Master after hearing the evidence introduced by the parties, filed his report, and from such evidence made certain findings of fact, from which it appears that a partnership exists between the complainant and the defendant, and that the complainant is entitled to an accounting, showing that there is due from the defendant to the complainant the sum of $1,033.73.

It also appears that the complainant and the defendant entered into a partnership agreement on or about March 1, 1920, to

35564

ERICK GRAINS CORNIE,

Appellant,

v.

WILLIAM C. MOSTRAY,

Appellee.

APPEAL FROM

SUPERIOR COURT

OF THE COUNTY.

Opinion filed May 4, 1932

MR. PRESIDING JUSTICE DELBERT OLIVER

This is an appeal by the complainant from a decree dismissing the complainant's bill of complaint for want of equity. The complainant's bill alleges the interlocutory relationship between the complainant and the defendant; that the same still exists, and prays for a partnership accounting. The answer of the defendant to this bill of complaint denies that such partnership still exists, and denies the complainant's right to relief. Upon the issues being joined the cause was referred to a master in chancery of the Superior Court.

The master after hearing the evidence introduced by the parties, filed his report, and from such evidence as to certain findings of fact, from which it appears that a partnership exists between the complainant and the defendant, and that the complainant is entitled to an accounting, showing that there is due from the defendant to the complainant the sum of $1,082.75.

It also appears that the complainant and the defendant entered into a partnership agreement as of about March 1, 1930, to

promote the sale, distribution and development of a patent for a globe holder collar; that they agreed that each should have an undivided one-half interest in the patent when issued, and should share equally in the profits and losses in connection with the development and promotion of said patent; that on August 29, 1922, a patent was issued for a weather protecting ring for street lamps; that thereafter, on January 25, 1923, a suit in equity charging the infringement of a patent was filed in the District Court of the United States, entitled, Woodliff, et al v. Chicago Pressed Steel Co., et al; that the complainant and the defendant in the instant case are parties defendant in the above entitled case; that the Master in Chancery considered the indebtedness to the firm of Cheever and Cox, who appeared as attorneys for the complainant and the defendant in the defense of said suit, and found that this indebtedness amounts to the sum of $2,567.50 and is a partnership debt; that of this amount $2,382.50 had been paid by the complainant, and that a balance of $185. is due on this amount. One-half of this expense, amounting to $1,283.77, appears to be due from the defendant. Allowing the defendant a credit of $250. on this sum of $1,283.77, which was paid to the complainant on July 7, 1922, leaves a balance due the complainant of $1,033.77, and the Master recommends that a decree be entered finding that the complainant is entitled to an accounting; that he is entitled to the amount appearing from the account stated, and that the relief prayed for by the complainant should be granted.

To this report objections of the complainant and the defendant were filed and overruled, and thereafter the objections so filed were ordered by the court to stand as exceptions.

It appears from the record that the court heard evidence in open court in considering the exceptions to the Master's report, which was not proper. All evidence offered in this case should

have been presented to the Master and considered by him in reporting his conclusions upon the law and the facts, and the proper practice under the facts as they appear in the record in the instant case, would have been to rerefer the case to the Master to take further and other evidence and make his report accordingly. Central Illinois Public Service Co. v. City of Sullivan, 294 Ill. 101, and Egan v. Egan, 244 Ill. App. 497. The court, after sustaining the exceptions of the defendant to the Master's report, entered a decree dismissing the bill of complaint for want of equity, and in doing so, found that the court had jurisdiction of the subject matter and of the parties, and also found that the complainant did not establish by proof the existence of the partnership, and that the complainant's right of action, if any, was in an action at law. It necessarily follows that the court is without jurisdiction to proceed further and should have dismissed the bill of complaint without prejudice. Because of defect of proof the equitable relief prayed for could not be granted. Brauer v. Laughlin, 235 Ill. 265. The court, however, proceeded upon the theory that the partnership was not established by the evidence, and that the arrangement between the complainant and the defendant for the creation, manufacture and disposition of the articles in question to the City of Chicago was collusive and therefore not enforceable. In that event an action at law will not lie.

The fact that the court considered evidence other than the Master's report appears from the decree itself. The court finds that the complainant and the defendant admitted in open court that the arrangment for the creation, manufacture and disposition of the articles sold to the City of Chicago was

disposition of the articles sold to the City of Chicago and open court into the stenographer for the question, examinations and court time the stenographer and the documents admitted in the Master's report supplied them the decree itself. The

The fact that the court considered evidence other than evant an action at law will not lie.

of Chicago was sufficient and that there was sufficient between the execution of the instrument and the delivery for the property, and undisputed and the articles in question to the city insufficiency was not established by the evidence, and that the argument could not be granted. Kramer v. Hamblin, 136 Ill. 632. The court, however, proceeded upon the theory that the particularity

should have dismissed the bill of complaint without prejudice. Because of defect of proof the Circuit Court erred for failure that the court is without jurisdiction to proceed further and right of action, if any, was in action at law. It merely held the existence of the partnership, and that the complainant's and also found that the complainant did not establish by proof court had jurisdiction of the subject matter and of the parties, complaint for want of equity, and in doing so, found that the the Master's report, entered a decree dismissing the bill of The court, after sustaining the exceptions of the defendants to

Miller, 286 Ill. 101, and Lynn v. Lynn, 286 Ill. 492.

acceptability. Central Lithonia Marble Co. v. City of

Later to take further and other evidence and make his report the instant case, would have been to refer the cause to the proper practice under the facts as they appear in the record to reporting his conclusions upon the law and the facts, and the have been presented to the Master and considered by him in

collusive, but upon this question at this time we express no opinion, nor upon any other question of fact in the record.

For the reasons expressed in this opinion the decree entered by the court is reversed and the cause remanded with directions that the case be rereferred to the Master in Chancery to take such further or other evidence as the court may direct and enter such other or further orders as are consistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

FRIEND AND WILSON, JJ. CONCUR.

266 Dec 1/4 6174

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35855

CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Trustee,

Appellee,

v.

LEONARD C. LEVY, ROSIE SCHWARTZ and LOUIS SCHWARTZ, et al,

ROSIE SCHWARTZ and LOUIS SCHWARTZ,

Appellants.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

266 I.A. 604[5]

Opinion filed May 4, 1932

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by the defendants, Rosie and Louis Schwartz, from an order appointing a receiver, based upon the complainant's verified bill of complaint and the evidence heard by the Court. The bill of complaint was filed by the complainant as trustee, which had been requested in writing by the holder of an unpaid bond to commence proceedings on behalf of all the bondholders to foreclose a trust deed securing the payment of 172 bonds aggregating $75,000, upon which there remained a balance of principal due in the sum of $57,500. The trust deed secured payments upon the real estate and improvements described in the bill of complaint. The maturity of the balance of the principal sum was accelerated under the terms and provisions of the trust deed because of the default in the payment of principal which became due on April 25, 1931, amounting to $1,000. It also appears from the evidence offered by the defendants and heard by the Chancellor, that there became due, prior to the time of the hearing of the motion for the appointment of a receiver, the sum of $2,000, part of the principal, and the further sum of $1,868.75, accrued interest due on the balance of the principal sum of $57,500.

The real estate in question is improved with an apartment building, consisting of 18-4 room apartments, and there

25866

CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Trustee,

Appellee,

v.

EDWARD D. LEVY, ROSE E. ROSENFELD
and LOUIS ROSENFELD, et al,

MORIS GOMBERG and LOUIS GOTTLIEB,

Appellants.

INTERLOCUTORY APPEAL

Trial Chancery Court

Cook County.

266 I.A. 604

Opinion filed May 4, 1932

MR. PRESIDING JUSTICE MATCH DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by the defendants, Louis and Louis Goberde, from an order allowing a receiver, based upon the complainant's verified bill of complaint and the evidence heard by the Court. The bill of complaint was filed by the complainant as trustee, which had been requested in writing by the holder of an unpaid bond to commence proceedings on behalf of all the bondholders to foreclose a trust deed covering the payment of 170 bonds aggregating $170,000, upon which there remained a balance of principal due in the sum of $97,500. The trust deed secured payments upon the real estate and improvements described in the bill of complaint. The security of the balance of the principal sum was accelerated under the terms and provisions of the trust deed because of the default in the payment of principal which became due on April 1, 1931, amounting to $1,000. It also appears from the evidence offered by the defendants and heard by the Chancellor, that there became due, prior to the time of the hearing of the motion for the appointment of a receiver, the sum of $5,000, part of the principal, and the further sum of $1,083.75, accrued interest due on the balance of the principal sum of $97,500.

The real estate in question is improved with an apartment building, containing of 12-4 room apartments, and there

is evidence, which was heard by the court to the effect that the property is of the value of $45,000.

The defendants, Rosie and Louis Schwartz, her husband, filed an appearance and a demurrer to the bill of complaint. They admitted the failure to pay the principal and interest due, and excused such failure on the ground that the Capital Mortgage Corporation had moved and left no address, and that payment of both principal and interest was to be made to the Capital Mortgage Corporation, in the City of Chicago, Illinois. It may be noted, however, that these defendants offered in evidence certain correspondence from a company named the Capital Company with reference to the payment of the amount due, and that the address of the Company, as given in the correspondence, was 1 North La Salle Street, Chicago. Be that as it may, these defendants, the owners of the equity of redemption, did not offer to pay the amount due at the time the court considered the motion for the appointment of a receiver. We cannot say that the court erred in appointing a receiver upon the facts charged in the verified bill and the evidence introduced by the parties to this controversy and heard by the Chancellor.

The defendants make the point that the bondholders of the defaulted bonds are not parties to the bill of complaint. We quite agree with the defendants that the general rule is, that in suits respecting the trust property the trustee, as well as the beneficiaries, in certain cases, is a necessary party. But to that rule there are certain exceptions, one of which is that where the absent parties are properly represented by a trustee in a foreclosure proceedings where the beneficiaries are numerous, and where the bonds are secured by the trust deed and are transferable by delivery, the beneficiaries are not necessary parties. St. L. & P. R. R. Co. v. Kerr, 153 Ill. 182. American Trust & Savings Deposit Company v.

property is of the value of £20,000.

The defendants, Wade and Doris Edwards, Pat Dunphy, filed an appearance and a demurrer to the bill of complaint. They admitted the failure to pay the original note [illegible] but exercised such failure on the ground that the Capital Corporation had moved and left no address, and that payment of said original had indorsed it to the Capital Corporation, in the City of Chicago, Illinois. It may be noted, however, that these defendants offered in evidence certain correspondence from a company named the Capital Company with reference to the payment of the amount due, and that the address of the Company, as given in the correspondence, was 1 North La Salle Street, Chicago. Be that as it may, these defendants, the owners of the equity of redemption, did not offer to pay the amount due at the time the court considered the motion for the appointment of a receiver. We cannot say that the court erred in appointing a receiver upon the facts charged in the verified bill and the evidence introduced by the parties to this controversy and heard by the Chancellor.

The defendants main the point that the bondholders of the debenture bonds are not parties to the bill of complaint. We quite agree with the defendants that the general rule is, that in suits respecting the trust property the trustee, as well as the beneficiaries, in certain cases, is a necessary party. But to that rule there are certain exceptions, one of which is that where the beneficiaries are so numerous that it would be impracticable to bring them before the court, or where the parties are difficult to find, the trustee in a foreclosure proceeding where the beneficiaries are numerous, and where the bonds are secured by the trust deed and are transferable by delivery, the beneficiaries are not necessary parties. 27 C. J. 1, 2, 3, 4. Keir v. Keir, 122 Ill. 168. Jackson Trust & Savings Deposit Company v.

180 East Delaware Bldg. Corp. 262 Ill. App. 67.

The bill in the instant case charges, in part, that the owners and holders of the bonds secured by the trust deed are numerous and widely scattered; that the interests of such owners and holders are in no respect in conflict with the interest of the complainant, and that the complainant brings suit for and on behalf of each and every of the owners and holders of said bonds, as required by the terms and provisions of the trust deed in question. From the allegations in the bill of complaint, this case comes well within the exception to the rule hereinbefore set forth.

Upon the interlocutory appeal from an order appointing a receiver, the question before this court is whether or not the order was a proper one. The statute permitting an appeal from an interlocutory order was not intended to provide for a review by this court of the ruling of the trial court upon demurrers. There is also the question as to whether or not suit was properly commenced to maintain the status quo and preserve the equitable rights of the parties. McDougall Co. v. Woods, 247 Ill. App. 170. This is not a final adjudication, and the interests of the defendants in the instant case are not finally disposed of in this proceeding and will not be disposed of until they have an opportunity to offer a defense. The trial court sought by its interlocutory order to preserve the estate until there was a final adjudication of the rights of the parties, and this court upon this appeal is without power to pass upon the merits of this controversy. The order is affirmed.

AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

Ind. Law Journal Supp. 1927. Ind. III. 4th. 47.

The bill in the instant case charges, in part, that the
owners and holders of the bonds secured by the trust deed are
numerous and widely scattered; that the interests of such owners
and holders are in no respects in conflict with the interest of the
complainant, and that the complainant brings suit for and on behalf
of each and every of the owners and holders of said bonds, as required
by the terms and provisions of the trust deed in question. Does
the allegations in the bill of complaint, this case comes well
within the exception to the rule hereinbefore set forth.

Upon the interlocutory appeal from an order sustaining
a demurrer, the question before this court is whether or not the
order was a proper one. The statute permitting an appeal from an
interlocutory order was not intended to provide for a review by this
court of the ruling of the trial court upon demurrer. There is
also the question as to whether we not will use properly exercised
to maintain the status quo and preserve the contingent rights of the
parties. Rochester Co. v. Foster, 182 Ind. 109. This is not a
final adjudication, and the interests of the defendants in the
instant case are not finally disposed of in this proceeding and will
not be disposed of until they have an opportunity to offer a
defense. The trial court sought by its interlocutory order to
preserve the estate until there can a final adjudication of the
rights of the parties, and this court upon this appeal is without
power to pass upon the merits of this controversy. The order is
affirmed.

Dausman.

Filed Dec 31st, 27. Clerk.

35213

AGNES TOLKMITT,

Plaintiff - Appellee,

v.

ALBERT LABA, and MAGGIE LABA,

Defendants - Appellants.

APPEAL FROM

MUNICIPAL COURT OF

CITY OF CHICAGO.

66 A

266 I.A. 605

Opinion filed May 4, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Agnes Tolkmitt, as plaintiff, brought suit in the Municipal Court of Chicago to recover various sums of money alleged to have been loaned to defendants, aggregating $320.00. Trial was had before the court resulting in a finding and judgment for plaintiff in the sum of $153.00 and costs.

Plaintiff's statement of claim alleges that she loaned defendants $100.00 on August 5, 1915, $70.00 on November 10, 1920, $25.00 in April, 1923, and $25.00 in June, 1923, and that defendants paid her on December 8, 1926, the sum of $5.00 and on December 23, 1926, the further sum of $10.00, claiming a balance of $205.00, which with interest amounted to $346.40. The trial court disallowed the item of $100.00, and no contention is made with reference thereto.

By the affidavit of merits filed, defendants interposed a plea of the statute of limitations and also denied the making of any loans from plaintiff and the repayment of the $15.00 or any other sum to plaintiff.

It appears from the evidence that plaintiff and Maggie Laba, one of the defendants, are sisters. With reference to the three principal items in dispute, plaintiff testified that in February, 1920, she loaned defendants $70.00 with which defendants purchased a stove for the home then occupied by them; that in 1923 she advanced $25.00 as attorney's fees, used in connection with the

Opinion filed May 4, 1933

sale of property at 3058 Leavitt Street, then owned by the defendant, Albert Laba; and that in 1923 she advanced the further sum of $25.00 for the purchase of a suit of clothes for Albert Laba, he being then out of employment. No receipts were taken for any of these items, but plaintiff produced a memorandum book containing entries made by various persons at her request, she being unable to write. Plaintiff testified that she had this book in her possession since 1915 and the entries therein were stated by her to have been made at the time that these various items were advanced to defendants.

With reference to the two payments of $5.00 and $10.00 respectively, made in 1926, plaintiff testified that shortly before Christmas, 1926, she was sick in bed and Mrs. Laba paid her $5.00 and about two weeks later paid an additional $10.00. Both of these payments were made at plaintiff's request, and at the time the payments were made, defendant, Maggie Laba, told plaintiff she was going to pay something every month on account of the indebtedness. In answer to several questions on this branch of plaintiff's testimony, she stated several times that defendant, Maggie Laba, promised to pay the rest of the money within a short time and as soon as she could spare it.

As grounds for reversal, it is first urged that the defense of the statute of limitations is a bar to the plaintiff's action. It appears reasonably clear from plaintiff's evidence that the three items aggregating $120.00 advanced by plaintiff to defendants were in the nature of household expenses and necessities and therefore became the obligations of both defendants. The pleading of the statute of limitations in a suit on an oral contract to recover items advanced over a long period, limits the recovery to such items as were advanced within five years prior to the beginning

of the suit, in the absence of circumstances removing the statutory bar. Miller v. Cinnamon, 168 Ill. 447. Where, however, new or express promises are made on the part of defendants, as in the instant case, or if any unqualified admission is made by them that the debt is due and unpaid, the indebtedness is revived. We believe that there is sufficient evidence in this record showing new and express promises made by the defendant, Maggie Laba, to toll the running of the statute as to all of the items advanced by plaintiff.

Defendants contend, however, that even though Maggie Laba acknowledged the indebtedness in 1936 and made payments on account thereof and expressly promised to pay further sums in the near future, that such conduct would not toll the running of the statute as to her husband, the other defendant. Cases cited to support this contention have no application to the circumstances shown in this proceeding. These advances were made for family necessities and used for the benefit of the husband as well as the wife.

Defendants insist that the finding and judgment of the court is contrary to the manifest weight of the evidence. The testimony of plaintiff on the one hand and defendants on the other is directly conflicting and it was for the court to determine the question of credibility. From an examination of the record we are not disposed to say that plaintiff's testimony is insufficient to support her claim or to disturb the verdict as being contrary to the weight of the evidence.

For the reason stated, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

of the suit, in the absence of circumstances investing the statutory bar. Miller v. Thompson, 126 Ill. 647. There, however, may or express promises are made on the part of defendants, as in the instant case, or if any unqualified admission is made by them that the debt is due and unpaid, the indebtedness is revived. To relieve that there is sufficient evidence in this record showing any and running of the statute as to all of the items claimed by plaintiff.

acknowledged the indebtedness in 1928 and made payments on account thereof and expressly promised to pay further sums in the near future, that such statement would not toll the running of the statute as to her husband, the other defendant. These also to remove this question have no application to the circumstances shown in this proceeding. These cases were made for family purposes and used for the benefit of the husband as well as the wife.

Defendants insist that the finding and judgment of the court is contrary to the manifest weight of the evidence. The testimony of plaintiff on the one hand and defendants on the other is directly conflicting and it is for the court to determine the question of credibility. Upon an examination of the record we are not disposed to say that plaintiff's testimony is insufficient to support her claim or to disturb the result on account contrary to the weight of the evidence.

For the reasons stated, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

MCGURN, P.J. and BIDDOR, J., concur.

35259

CHICAGO NATIONAL LIFE INSURANCE COMPANY, a Corporation,

(Complainant) Appellant,

v.

JOHN M. GIBBONS,

(Defendant) Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

266 I.A. 605

Opinion filed May 4, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

ON February 25, 1927, Jennie Gibbons made application to the Chicago National Life Insurance Company for insurance on her life in the sum of $2,000.00 on the company's regular form for selective risks, requiring no medical examination. The defendant, John Gibbons, was designated as beneficiary in said policy. The complainant issued its policy to Jennie Gibbons on March 1, 1927, she paying the required first annual premium. The insured died December 2, 1927, approximately nine months after the policy was issued. Her husband, beneficiary under the policy, furnished complainant with proofs of death on December 17, 1927, but liability was denied on the ground that the applicant had misrepresented facts with respect to the condition of her health and former treatments by physicians and had fraudulently procured the policy from complainant.

On February 27, 1928, no suit having been filed by the beneficiary against complainant to which the latter could plead its defense, the company filed its bill of complaint in equity seeking to have the said policy of insurance cancelled and rescinded, and tendered the amount of the premium paid on the policy.

The bill of complaint as amended alleged in substance that Jennie Gibbons made false and fraudulent answers to certain questions propounded to her in her application for insurance, as

(Defendant) Appellee.

v.

JOHN E. GIBBONS,

(Complainant) Appellant,

COMPANY, a Corporation.

ORIGINAL BANKING LIFE INSURANCE

Opinion filed May 4, 1933

266 I.A. 605

to the condition of her health, her treatment by practicing physicians, and her age. Defendant by his answer denied generally all of the allegations as to misrepresentations of fact contained in the bill of complaint, and averred that there were no material misrepresentations by Jennie Gibbons in her said application. Together with his answer, defendant filed a cross bill, attaching a copy of the policy, and praying for a money decree in the sum of $2,000.00, as beneficiary on the policy. Cross defendant answered the cross bill making substantially the same averments as are contained in the original bill of complaint and the amendment thereto, which alleges that Jennie Gibbons falsified as to her correct age. Upon the issues thus joined under the pleadings, the matter was referred to a Master in Chancery, who recommended dismissal of the bill and a decree in favor of cross complainant. The chancellor, after hearing, entered a decree in accordance with the master's recommendations, dismissed the bill of complaint for want of equity and entered a decree in favor of cross complainant in the sum of $2,000.00, interest and costs. This appeal is prosecuted to reverse the decree thus entered.

The various points raised by complainant's brief resolve themselves into the general question whether the statements made by Jennie Gibbons in her application for insurance were false and fraudulently made, and of such a nature as to exonerate the company of liability.

It seems to be conceded that Jennie Gibbons' death was due to a cancer of the uterus and vagina. One of the questions propounded in the application was: "Have you consulted a doctor for treatment within the past five years?", to which Jennie Gibbons answered, "No." The evidence discloses that in February and March, 1925, she had received treatments from Van H. Fossler, an osteopath,

to the condition of her health, not treatment by [illegible]
physicians, and her age. Determined by his answer during [illegible]
all of the allegations as to misrepresentations of fact contained
in the bill of complaint, and averred that there were no material
misrepresentations by Jennie Osborne in her said application.
Together with his answer, defendant files a cross bill, attached
a copy of the policy, and praying for a decree ordering the sum of
$2,000.00, as beneficiary on the policy. Upon defendant entered
the cross bill making substantially the same statements as are con-
tained in the original bill of complaint and the respondent thereto,
also alleges that Jennie Osborne visited as to her correct age.
Upon the issues thus joined under the pleadings, the matter was
referred to a Master in Chancery, the respondent dismissed of the
bill and a decree in favor of cross complainant. The complainant,
after hearing, entered a decree in accordance with the master's
recommendations, dismissed the bill of complaint for want of equity
and entered a decree in favor of cross complainant in the sum of
$2,000.00, interest and costs. This appeal is prosecuted to reverse
the decree thus entered.

The evidence points raised by complainant's brief consists
[illegible] made, and of such a nature as to eliminate the question
of liability.

It seems to be conceded that Jennie Osborne, death was
due to a cancer of the uterus and kidneys. One of the questions
propounded in the application was: "Have you consulted a doctor for
treatment within the last five years?" to which Jennie Osborne
answered, "no." The evidence shows that in February and March
1921, she had personal consultations [illegible] on several

who found that she had a slight inflamation in the gall bladder and was somewhat constipated. He administered general osteopathic treatments. Another osteopath, Bertha Hapke, attended her in May, 1927, approximately three months after the policy was issued. When she first saw Jennie Gibbons, Mrs. Hapke did not diagnose her ailment. X-rays were taken by Dr. MacGregor, who then advised Mrs. Hapke of a cancerous condition. Since Fossler in 1925 and Mrs. Hapke in May, 1927, had been unable to diagnose her illness, it can hardly be contended that Jennie Gibbons had any intimation that she was suffering from cancer until the diagnosis was definitely made several months after the policy was issued. In connection with the foregoing question propounded in the application for insurance, complainant insists that Jennie Gibbons' answer was false and fraudulent. This raises the further inquiry as to whether an osteopath may be said to be a physician. Counsel for both sides quote dictionary definitions and cite cases purporting to distinguish between osteopaths and physicians and differantiating the practices between physicians, surgeons and osteopaths. From the very fact that counsel and the authorities seem to be not entirely in accord on this difference, it is not difficult to conceive that the applicant, Jennie Gibbons, may have regarded her answer to the interrogatory as true and correct. In any event, it seems clear that Jennie Gibbons did not regard her illness as particularly serious when she began receiving treatments from Fossler, because she then complained only of constipation and a tired feeling. The policy in question provided that in the absence of fraud, statements made in the application should be deemed representations and not warranties. We believe the chancellor was correct in finding that the answer to the foregoing interrogatory was not a fraudulent representation, and in the absence of proof of fraud or intentional misstatement on the part of the insured, the policy will not be rendered void merely because the

who found that she had a slight inflammation in the left ovary and was somewhat constipated. He ordered several laxative tablets. Another physician, Dr. Frank Boyle, attended her in July, 1927, approximately three months after the policy was issued. When the first was Jennie Gibbons, ere. Boyle did not diagnose her ailment. X-rays were taken by Dr. Dunnegan, who then advised its. Boyle of a cancerous condition. Gibbs Hospital in 1928 and Mrs. Boyle in July, 1927, but were unable to diagnose her illness, it can hardly be contended that Jennie Gibbons had any intention that she was suffering from cancer until the diagnosis was definitely made several months after the policy was issued. In connection with the foregoing question propounder in the application for insurance, complainant insists that Jennie Gibbons' answer was false and fraudulent. This raises the further inquiry as to whether an estoppel may be said to be a physician. Counsel for both sides quote dictionary definitions and cite cases purporting to distinguish between estoppels and waivers and differentiating the treatises between physicians, surgeons and osteopaths. From the very fact that counsel and the authorities seem to be so certainly in accord on this difference, it is not difficult to conceive that the relations, Jennie Gibbons, may have regarded her answer to the interrogatory as true and correct. In any event, it seems clear that Jennie Gibbons did not regard her illness as sufficiently serious when she began receiving treatments from Dunnegan, because she then complained only of constipation and a tired feeling. The policy in question recited that in the absence of fraud, statements made in the application should be deemed representations and not warranties. It believe the opposition was correct in finally that the answer to the foregoing interrogatory was not a fraudulent representation, and in the absence of fraud or intentional misstatement on the part of the insured, the policy will not be rendered void merely because the

answer proved to be untrue. Moulor v. American Life Insurance Co., 111 U. S. 335, Globe Mutual Life Insurance Co. v. Wagner, 188 Ill. 133. Moreover, it was held in Delvaux v. Metropolitan Life Insurance Co., 172 Ill. App. 537, that visits to a doctor on ailments believed to be trivial will not avoid a policy even if not reported. In discussing the fact that the insured had failed to disclose that treatments had been received from a doctor, the court in the last cited case held that his failure to mention consultations with a physician regarding a temporary condition were not fraudulent or intentional.

Further complaint is made that Jennie Gibbons falsely and fraudulently answered "No" to question No. 7, which was as follows: "Have you within the past three years occupied the same room with a consumptive?"; and that she falsely and fraudulently answered "No" to question No. 16, which was, "If you have ever been treated or operated on by a physician, may we write to him for a written statement"; and that she falsely and fraudulently answered "No" to question No. 30, which was, "Have any members of your family, including parents, brothers, sisters, uncles and aunts, wife, husband or children had or been treated for chronic bronchitis, diabetes, nervous or mental disorder?"; and to question No. 31, which was, "Have you ever been treated for any of the following diseases or ailments; stomach, intestines, gall bladder, gall stones?"; she falsely and fraudulently answered "No". In the light of the circumstances of this case, the answers of these questions were immaterial, and the facts concealed, if known, could have had no reasonable bearing upon the risk assumed. As heretofore stated, Jennie Gibbons evidently did not consider her ailments serious and certainly had no advice from any of the osteopaths who attended her as to the true condition of her health. Constipation and a tired feeling, which were the symptoms of which she complained, are not in themselves such ailments as to cause alarm, and to a lay woman could not cause apprehension of an impending fatal disease. Therefore, the answers to these questions

answer proved to be untrue. Shockey v. Jefferson Life Insurance Co., III U. 3. 330, Globe Mutual Life Insurance Co. v. Reagan, 139 III. 123. Moreover, it was held in Delaney v. Metropolitan Life Insurance Co., 178 III. App. 537, that where to a question relative to be trivial will not avoid a policy even if not responded. In discussing the fact that the insured had failed to disclose that treatments had been received from a doctor, the court in the last cited case held that his failure to mention consultations with a physician regarding a temporary condition were not fraudulent or intentional.

Further complaint is made that Dennis falsely and fraudulently answered "No" to question No. 7, which was as follows: "Have you within the past three years consulted the same with a chiropractor?"; and that the falsely and fraudulently answered "No" to question No. 12, which was, "If you have ever been treated or operated on by a physician, may we write to him for a written statement"; and that she falsely and fraudulently answered "No" to question No. 20, which was, "Have any members of your family, including parents, brothers, sisters, uncles and aunts, with, husband or children had or been treated for chronic bronchitis, diabetes, nervous or mental disorder"; and to question No. 21, which was, "Have you ever been treated for any of the following diseases or ailments; stomach, intestines, gall bladder, gall stones"; she falsely and fraudulently answered "No". In the light of the circumstances of this case, the answers of these questions were immaterial, and the facts concealed, if known, could have had no reasonable bearing upon the risk assumed. It heretofore stated, Dennis evidently did not consider her ailments serious and certainly had no motive to be by if the chiropractic who attended her on to the true conditions of be benefit. Medication and a tired feeling, which were the symptoms of which she complained, are not in themselves such ailments as to cause alarm, and it is not when could not cause aggravation of an

come within the purview of the doctrine enunciated in the foregoing cases that failure to report what the applicant evidently considered trivialities or temporary ailments, even though not reported, would not avoid the policy.

By the amendment to the bill of complaint, falsity and fraud is imputed to Jennie Gibbons for failure to state her correct age in the application. It is alleged that she gave her age as 44, whereas, she was in fact 62 years old. Upon this question, voluminous testimony was adduced pro and con through the testimony of witnesses here and abroad who knew her as a girl and throughout most of her life. There appears to be a sharp conflict in the evidence as to whether Jennie Gibbons was born in Ireland, or in the State of Illinois, and throughout the evidence there is a question of idenitity between a Jennie Gibbons who was born in Ireland in 1865 and the applicant under this policy of like name born in Maytown, Illinois. At best, the testimony upon this question is controversial, and the chancellor who heard the evidence and had an opportunity to observe the witnesses was better qualified to determine the question of fact as to whether there was a false repetition with reference to the applicant's age than we are, and we are not disposed to disturb his finding in this regard.

After a careful examination of the record and the controlling questions in this case, we have reached the conclusion that the decree as entered is free from error and arrives at a substantially just determination of the litigant's rights. The decree will, therefore, be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

done within the phrase of the document mentioned in the following
case that failure to report what the applicant extremely considered
triviality or temporary element, even though not concerned,
would not avoid the policy.

By the amendment to the Bill of Copyright, Finlay and
friend is invited to Jamie Gibbons for dinner to celebrate her success
ogy in the application. It is stated that she lives her as 41,
abortee, she was in fact 52 years old. Upon this question, mis-
nimous testimony was adduced and can through the testimony of
witnesses here and beyond she knew her as a girl and throughout
most of her life. There appears to be a sharp conflict in the
evidence as to whether Jamie Gibbons was born in Ireland, or in
the State of Illinois, and throughout the evidence it are is a
question of identity between a Jamie Gibbons who was born in Ireland
in 1885 and the applicant under this policy of life born in
Mayhem, Illinois. It does, the testimony upon this question is
contradictory, and the chancellor who heard the evidence and had
an opportunity to observe the witnesses was better qualified to de-
termine the question of fact as to whether there was a true resem-
blance with reference to the applicant's age that we have, and we
are not disposed to disturb his finding in this regard.

After a careful examination of the record and the
controlling questions in this case, we have reached the conclusion
that the decree as entered in open Court was erroneous at a mis-
essentially just determination of the litigant's rights. The decree
will, therefore, be affirmed.

AFFIRMED.

KINGS, P.J. AND KIRKS, J. CONCUR.

35265

MILTON BENZOIN,

(Plaintiff) Appellee,

v.

NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE CO.,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

266 I.A. 605

COOK COUNTY.

Opinion filed May 4, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant in the Superior Court of Cook County on a burglary insurance policy, to recover for losses alleged to have occurred through burglary of his place of business located at 4638 Lincoln Avenue in Chicago, Illinois. Trial was had by the court without a jury, resulting in a finding and judgment for plaintiff in the sum of $1623.33.

The declaration sets forth the policy sued on in haec verba and alleges loss of merchandise belonging to plaintiff, by burglary, on December 21, 1929. It avers notice to police authorities and the agent of the defendant and that plaintiff furnished defendant with facts and figures in regard to said burglary and a complete inventory of the stolen property. The declaration further alleges that plaintiff fully complied with and performed all terms and provisions of said policy required by him to be complied with and performed, but that defendant denied liability for said loss, and that there is now due and owing to plaintiff from defendant the sum of $1623.33. To this declaration defendant filed a plea of the general issue and an affidavit of defense, averring in substance that immediate notice was not given to the company as required by the policy; that the burglar alarm system installed on the premises was not maintained by plaintiff in proper working order as required by the policy; that the loss did not occur by burglary; that plain-

Opinion filed May 4, 1932

tiff did not file proof of loss as required by the policy and the insurance company did not waive that requirement or any of the requirements of the policy; and also a general denial of indebtedness.

The facts, so far as they are material to the issues involved, disclose that plaintiff was engaged in the retail ladies apparel business at 4628 Lincoln Avenue in Chicago; that at the time of the alleged burglary there was installed on said premises a Standard Burglar Alarm System; that the windows, doors and transom were all wired with coil and there was a piece of fine string or thread stretched across the floor when the store was closed, known as a trap. Plaintiff testified that on the night of the 20th of December he closed all the windows and doors, stretched the string or trap, put his key in the alarm lock on the outside of the front door, opened the alarm box and threw in the bell switch, which rings the alarm, that he then took out the bell switch, pressed the button on the alarm box which stops the alarm, adjusted the main switch which indicates that the alarm is correctly set, and locked the door by means of a Siegal lock located on the outsdie. Ellen Smalldone, an employee of plaintiff, was present at the closing of the store and corroborated plaintiff's testimony.

About 5:30 o'clock the next morning plaintiff was notified by the police that his store had been burglarized. He came over immediately and found that the front plate glass door had been smashed and the door still locked. Various articles of merchandise, including dresses, handkerchiefs, hosiery and costume jewelry had been removed from the display cases in the store. Plaintiff said that he did not notice the condition of the alarm system generally, but that the wiring on the plate glass door was smashed and the string in the trap was broken. About 6 o'clock that morning plaintiff called Ralph Jacobs, an agent of defendant, and advised him of the burglary. Jacobs sent an adjuster, one Jerome Mayer, to [illegible]

plaintiff's store about noon of the same day. Mr. Mayer inquired about the burglary and plaintiff told him the story as related by the police. A check-up was then made of plaintiff's books and a list of the missing articles taken to the office of the adjuster. This list consists of two pages written in long hand, enumerating the articles stolen and the price thereof, showing a total loss of $1623.33.

It appears from the evidence that shortly after an itemized list of the missing merchandise was prepared by plaintiff and delivered to the adjuster's office together with plaintiff's books of account, Jacobs Brothers, defendant's agents, received a letter from defendant dated January 20, 1930, stating that pursuant to an investigation of the loss reported under plaintiff's policy, "We beg to advise that owing to breach of warning under the policy contract, this loss is one for which the company is not liable, and we ask that you so advise your assured." The information contained in this letter was given to plaintiff immediately upon receipt thereof and terminated all negotiations for adjustment of the loss sustained by plaintiff. Under the provisions of the policy plaintiff had sixty days within which to furnish the required proof of loss, and it thus appears that within thirty days after the burglary defendant declined to pay the loss upon the sole ground, as stated in its letter, that there was a breach of warning under the policy contract.

Clause No. 6 contained in the schedule of the policy provides that the "burglar alarm system will be maintained during the currency of this insurance in proper working order and will be tested and left duly connected for the night at the close of business each day." To sustain the defense that there was a breach of warning under the policy defendant sought to show by testimony of William F. Streit of the Standard Burglar Company that he arrived

Dorland Insurance Co. Ltd. 1 Queen Victoria Street, London EC4N 4XX. Tel: 020 7236 2233.

It appears from the statement of Timothy Allen on behalf of Plaintiff that the missing documents are included in the itemised list of the missing documents enclosed by Plaintiff's letter from Solicitors dated January 30, 1990, stating that document's "Jones Lawyers" document's request", received a letter from Solicitors dated January 30, 1990, stating that document people of document, Jones Lawyers, document's request", received a and delivered to the solicitors office between 4:00pm Plaintiff's itemised list of the missing documents are included by Plaintiff

It appears from the statement of Timothy Allen on behalf of the Plaintiff, that there are 3 documents missing, namely, a letter from Solicitors.

writing stolen and the extra insured, namely, a copy page of Lyle list consists of two extra entries in item four, enumerating the list of the stolen articles items to the office of the solicitor.

the police. I check-up one item page of Plaintiff's memo and a about the burglary one Plaintiff took his the story we notice at Plaintiff's story about each of the item by. Mr. Edgar inquired

at the premises about 9 or 10 o'clock in the morning following the burglary and then found the door of the alarm box open. The court, however, sustained an objection to this testimony on the ground that Streit's inspection of the burglar alarm was too remote in point of time, police officers and others having been there for several hours following the burglary and having inspected the alarm before Streit arrived. We believe the court's ruling on this question was proper. Defendant also introduced the statement of an eye witness to the burglary, one E. J. Morris, to the effect that he heard the crash of the glass when the front door was broken, saw the burglars leave the premises and drive away in a car, but that at no time did he hear the burglar alarm ring. It is also pointed out that the policeman who arrived at plaintiff's store shortly after the burglary stated that the gong was not ringing. Based upon this evidence, defendant insists that the court should have sustained its contention that plaintiff failed to maintain the alarm system in proper working order and that there was, therefore, a breach of warning to justify disclaimer of liability on the part of defendant. We have heretofore summarized plaintiff's testimony with reference to the various steps taken by him on the evening preceding the burglary to adjust the alarm system and lock the door of the premises. This evidence taken together with the testimony relied upon by defendant, created an issue of fact to be determined by the court from all the evidence, and from an examination of the record we are not disposed to disturb the court's finding as being contrary to the manifest weight of the evidence.

As further grounds for reversal it is urged that plaintiff failed to file an affirmative proof of loss under oath, and that even though there was an investigation of the loss by the company's representative, such investigation does not constitute a waiver of the requirements of the policy. The cases cited in support

at the premises about 8 or 10 o'clock in the morning following the
burglary and then found the door of the flats ajar. The court,
however, sustained an objection to this testimony on the ground that
Streit's knowledge of the burglary might not be imputed in point of
time, police officers and others having been there for several hours
prior to plaintiff and having transacted the same before Streit
arrived. We believe the court's ruling on this question was correct.
Defendants also introduced the statement of an eye witness to the burg-
lary, one E. G. Martin, to the effect that he heard the sound of the
glass when the front door was broken, saw the burglars leave the
premises and drive away in a car, but that at no time did he see the
burglar alarm ring. It is also pointed out that the policeman who
arrived at Quantrill's store shortly after the burglary stated that
the bell was not ringing. Based upon this evidence, defendants insists
that the court should have submitted the question that Quantrill
failed to activate the alarm system in proper working order and
that there was, therefore, a breach of warranty in legally discharger
of liability in the event of defendant. We have heretofore enumerated
plaintiff's contract duty relative to the various steps taken by
him on the evening preceding the burglary to adjust the alarm system
and lock the door of the premises. This evidence taken together
with the testimony relied upon by defendant, created an issue of
fact to be determined by the court upon all the evidence, and from
court's ruling on the amount of the recovery to which plaintiff's
evidence.

In another connection it is urged that plaintiff's testimony as to the market weight of the merchandise destroyed was not sufficient to support a judgment, but that even though there was an investigation of the loss by the insurance carrier, such investigation does not constitute a matter of the circumstances of the matter. The mere offer to exhibit

of this contention, however, are not applicable because it clearly appears from the evidence that the defendant, having declined liability within the specified time fixed by the contract of insurance on the specified ground of "breach of warning", waived the necessity of filing formal proofs of loss. It was so held in Dvorak v. The Hartford Fire Insurance Company, 253 Ill. App. 76, wherein the court said:

> "It is true that the rule is well settled in this state that where an insurance company expressly denies its liability under a policy of insurance before the expiration of the time for furnishing the proofs of loss required by the policy, the furnishing of such loss by the insured is thereby waived."

In Continental Insurance Co., v. Buckman, 127 Ill. 364, the court held that although the proofs failed in some particulars to answer all the requirements of the policy, nevertheless that question was immaterial, since the defendant, on receiving the proofs, instead of pointing out the deficiency therein and requiring further statement and certificate, refused to pay the loss, based its refusal wholly upon the ground that the condition prohibiting the vacancy of the buildings without notice and consent had been broken. Lumberman's Mutual Insurance Company v. Bell, 166 Ill. 400 and Phoenix Insurance Company v. Tucker, 82 Ill. 64, are to like effect. These cases enunciate the rule followed in this state and are directly applicable to the instant proceeding.

It is next urged that there is a variance between the allegations of the declaration and the proof, in that the declaration alleges performance and the proof introduced on behalf of plaintiff seeks to excuse or show waiver of the requirements of the policy. This contention is based upon that part of the declaration which avers that plaintiff "has fully complied with and performed all the terms and provisions of said policy required by him to be complied with and performed." Defendant insists that by reason of this aver-

of this contention, however, are not applicable because it clearly appears from the evidence that the Carlsons, having declined liability within the specified time fixed by the contract of insurance on the specified ground of "breach of warranty", waived the necessity of filing formal proofs of loss. It was so held in Powers v. The Hartford Fire Insurance Company, 225 Ill. App. 98, wherein the court said:

> "It is true that the mere it will waived in this state that before an insurance company can successfully denies its liability under a policy of insurance before the expiration of the time for furnishing the proofs of loss required by the policy, the insured was justified, since the defendant, in asserting the shereby waived."

In Continental Insurance Co., v. Dotzman, 137 Ill. 364, the court held that although the proofs failed to show particulars to support all the requirements of the policy, nevertheless that objection was immaterial, since the defendant, in asserting the ground of resisting the claim and repudiating the entire contract, refused to pay the loss, based its refusal wholly upon the ground that the condition forbidding the waiver of the building without notice and consent had been broken. Insurance's Mutual Insurance Company v. Dell, 180 Ill. 490 and Phoenix Insurance Company v. Doerr, 88 Ill. 64, are to like effect. These cases associate the rule followed in this state and are directly applicable to the instant proceeding.

It is next urged that there is a variance between the allegations of the declaration and the proof, in that the declaration alleges performance and the proof introduced on behalf of plaintiff seeks to excuse or show waiver of the performance of the policy. This contention is based upon that part of the declaration which

ment plaintiff was precluded from introducing evidence tending to show a waiver of one of the conditions of the policy. We cannot agree with this contention, however. Plaintiff did not allege that he had fully complied with the policy in every respect, indicating that he relied upon a strict compliance, but qualified the averment by stating that he had complied with the terms of the policy "required by him to be complied with and performed." Since defendant definitely disclaimed liability under the policy within the time provided for filing proofs of loss, it relieved plaintiff from the contract obligation to furnish proofs, and, therefore, this condition was no longer one required by plaintiff to be complied with and performed. We are of the opinion that under the foregoing allegation of the declaration it was competent for plaintiff to introduce evidence showing a waiver without subjecting himself to the objection that a variance existed between the declaration and the proof. Moreover, under the rule generally followed in this state, all pleadings will be construed liberally in favor of the pleader to sustain the judgment after the same is rendered. Roumbos v. The City of Chicago, 332 Ill. 70, Smith v. Rutledge, 332 Ill. 150.

We find no reversible error, and for the reasons herein stated, the judgment of the Superior Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

35441

IN THE ESTATE OF JAMES McCORMICK, DECEASED,

ALTA N. GINGRICH, Claimant Below,

Appellee,

v.

JOSEPH McCORMICK, Administrator of ESTATE OF JAMES McCORMICK, Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

266 I.A. 605

COOK COUNTY.

Opinion filed May 4, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

By this appeal, consolidated with cause No. 35442, Joseph McCormick, Administrator of the Estate of James McCormick, deceased, seeks to expunge two orders of the Circuit Court of Cook County, vacating orders of dismissal of said causes for want of prosecution.

Both causes grow out of appeals from the Probate Court of Cook County. In this proceeding a claim was there filed by Alta N. Gingrich, the plaintiff, against the Estate of James McCormick, deceased. On hearing, the Probate Court disallowed the claim from which an appeal was prosecuted by plaintiff to the Circuit Court. In cause No. 35442, a petition for citation was filed in the Probate Court, praying that said Alta N. Gingrich deliver certain personal property over to the Administrator. The court entered an order allowing the prayer of the petition from which an appeal was likewise prosecuted to the Circuit Court.

By its order of July 25, 1930, the Executive Committee of the Circuit Court entered a general order whereby the clerk of said court was directed to prepare six lists containing, in numerical order, all pending common law cases. List No. 5 was assigned to the Honorable Dennis J. Normoyle. In and by said order the clerk was further directed to prepare a list of special cases not

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Opinion filed May 4, 1933

falling within the general classification of common law cases, among which appeals from the Probate Court were enumerated and ordered placed on Calendar No. 5 and assigned to Judge Normoyle. By this same order the clerk was also directed to docket all appeals from the Probate Court, effective July 21, 1930, to Judge Normoyle.

On September 30, 1930, the Executive Committee of said court entered a further order directing that appeals from the Probate Court should be heard without requiring compliance with the provisions of Rule 23 of said court, which dispensed with the practice of preparing printed law and chancery trial calendars, and provided in effect that pending cases, at issue, might be placed upon the trial calendar of the judge to whom they were assigned on five days notice.

On October 14, 1930, both of said appeals were reached on the regular call of the court calendar and were dismissed by Judge Normoyle for want of prosecution.

Thereafter on January 10, 1931, plaintiff filed her petition before the Honorable George F. Rush of said court, to whom the Executive Committee by its order of January 7, 1931, had assigned Calendar No. 5, praying that the orders of Judge Normoyle, dismissing said appeals, be vacated. By order of that date Judge Rush vacated Judge Normoyle's order of dismissal in case No. 35441 and reinstated said cause on the trial calendar. By order entered on April 3, 1931, nunc pro tunc as of January 10, 1931, Judge Rush likewise vacated the order of dismissal in case No. 35442 and reinstated said cause.

Thereafter on April 10, 1931, defendant filed a petition before Judge Rush praying that the orders reinstating said causes, be vacated. On May 1, 1931, Judge Rush ordered the cases referred to the Executive Committee for reassignment to Judge Normoyle. On May 11, 1931, the Executive Committee entered an order directing that said causes be reassigned to Judge Rush. On May 15, 1931, Judge Rush entered a second order transferring said cases to the Executive Committee for reassignment to Judge Normoyle.

The petition of the defendant, filed on April 10, 1931, came on for hearing before Judge Normoyle, with the consent of Judge Rush, on June 24, 1931, and on that date an order was entered by Judge Normoyle overruling the motion of the defendant and reinstating the cases which he had previously dismissed for want of prosecution. Said order of June 24, 1931, was followed on July 7, 1931, at the same term, by a formal and amended order to like effect. This appeal is prosecuted from the last order thus entered by Judge Normoyle.

No appearance nor briefs have been filed by the appellees herein. Defendant's petition, which is set out in the abstract of record, alleges in substance that the appealed causes appeared on Judge Normoyle's trial call on October 14, 1930, without any notice to petitioner and were dismissed by the court without a hearing on the merits; that under the provisions of Rule 23 of said court no cause shall appear on the trial call of any judge which has not been noticed for trial pursuant to the provisions of said rule; that said causes were not noticed for trial as required by Rule 23 and were, therefore, erroneously placed upon the trial call of said court; and that petitioner has a good and meritorious claim against the estate and, therefore, prays that the orders of dismissal be vacated and set aside and said appeals reinstated.

The petitioner evidently proceeded under Section 89 of the Practice Act and the controlling question presented for review is whether petitioner is entitled to invoke the provisions of said act to set aside an order of the court after the elapse of several terms of court. As an approach to the determination of this question, we are required to consider the validity of the various orders entered by the court's Executive Committee, and to determine whether Rule 23 is applicable to the class of cases which were dismissed by Judge Normoyle on October 14, 1930.

For lack of briefs to assist us in the determination of

The petition of the defendant, filed on April 10, 1931,
came on for hearing before Judge Kennedy, with the consent of Judge
Hackett, on June 10, 1931, and on that day it again was dismissed by
Judge Kennedy substantially the motion of the defendant was reinstated
the cause which he had previously dismissed for want of prosecution.
Judge Hackett substantially the motion of the defendant was reinstated
June 10, 1931, and on that day it again was dismissed by
same for hearing before Judge Kennedy, with the consent of Judge
The petition of the defendant, filed on April 10, 1931,

the appellee's position in the matter, it is impossible to determine whether the validity of the executive orders are questioned. It is clear, however, that these orders were entered in accordance with the usual practice followed in the Circuit Court in the matter of assigning cases and fully within the powers of the Executive Committee. Prior to the enactment of Rule 23, it had for years been the practice in the Circuit Court to direct the clerk to prepare printed calendars of all law and chancery cases. These various calendars were assigned to the judges sitting in law and chancery and copies of the calendars were distributed to the members of the bar. The various judges from time to time published calls from these calendars, which appeared in the Chicago Daily Law Bulletin and disposed of cases as they were assigned and reached on their respective trial calendars. Rule 23 dispensed with this practice, and in lieu thereof made it encumbent upon litigants who desired to have their cases tried, to notice them for trial. It appears clearly, however, that by the order of the Executive Committee entered on September 30, 1930, appeals from the Probate Court were expressly exempted from the provisions of Rule 23 and that such appeals were, as a matter of practice, placed on the regular trial call of the court and disposed of when reached. In accordance with this procedure, Judge Normoyle assigned these two appeals to his regular court calendar, where they were dismissed when reached on the regular call for want of prosecution. This procedure was fully in accord with the usual practice as well as the rules of court and the orders of the Executive Committee.

It, therefore, remains to be determined whether the writ of error coram nobis, as provided in Section 89 of Chapter 110, Cahill's Revised Statutes of Illinois, 1929, commonly known and referred to as the Practice Act, can be construed to afford relief, after the term, to a defendant whose cause has been dismissed for want of prosecution under circumstances such as appear by the peti-

tion filed herein. The rule is well settled in this state that the proceeding contemplated by this statute was intended to correct errors of fact in the entry of a judgment, which may be brought to the attention of the court after the term. The error in fact which may be assigned under such a motion, however, must be some fact unknown to the court which, if known, would have precluded the rendition of the judgment. Cramer v. Illinois Commercial Men's Association, 260 Ill. 516, In re La Page's Estate v. Devine, 195 Ill.App. 140. The decisions are generally to this effect. Applying this rule of law to the instant proceeding, it must be assumed, of course, that Judge Normoyle, to whom the appeal calendar had been assigned and who was hearing these cases day after day, was fully cognizant of the order of the Executive Committee and thoroughly familiar with the exceptions made to Rule 23, which required no notice in appeals from the Probate Court. From this it would follow that the court was guilty of no error of fact, which if known, would have prevented him from entering the orders of dismissal. Indeed, no fact existed which, had it been brought to the attention of the court, would have prevented it from entering these orders. If there was any error, it was an error of law, and a proceeding under Section 89 cannot be maintained to correct such errors. McCord v. Briggs & Turivas, 338 Ill. 158, Marabia v. Mary Thompson Hospital, 309 Ill. 147, Chapman v. North American Life Insurance Co., 292 Ill. 179.

We are of the opinion that the Circuit Court was without jurisdiction to vacate the orders of dismissal at a subsequent term. The orders entered will, therefore, be reversed and the cause remanded with directions to expunge both orders of reinstatement and to allow the original orders of dismissal to stand as entered.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

tion filed herein. The time is still allowed in this state that the proceeding contemplated by this statute was instituted to protect estate of Lee in the event of a judgment, which may be enough to the attention of the court after the fact. The statute in that which may be realized under such a motion, however, must be some fact supreme to the moment when, it known, would have terminated the rendition of the judgment. Cooper v. Illinois Insurance Co., 3 Scammon, 380 III. 318; In re In Pratt's Estate v. Morse, 108 III.App. 140. The decisions are especially to this effect. [illegible] side of the to the instant proceeding, it does be observed, of course, that Judge Morrow, to whom the appeal mandate had been entrusted [illegible] made to Rule 11, which required no notice to opposite [illegible] of the Executive Committee and thereafter [illegible] hearing there being only eight [illegible] Court. From this it would [illegible] effect of fact, which it [illegible] the order of dismissal. Indeed, in fact existed which, had it been brought to the attention of the court, would have terminated in [illegible] entering these orders. If there was any error, it was an error of law, and a proceeding under [illegible] to maintained to restore such error. Bennet v. Rising & Dreyer, 201 III. 167; Kennedy v. Duff Sanitary Milk Company, 208 III. 172.

We are of the opinion that the Circuit Court was without jurisdiction to vacate the orders of dismissal at a subsequent term. The orders entered will, therefore, be reversed and the cause remanded with directions to dismiss said orders of dismissal and to allow the original orders of dismissal to stand as entered.

REVERSED, R.T. AND CAUSE, T. REMANDED.

35442

IN THE ESTATE OF JAMES McCORMICK, DECEASED,

ALTA N. GINGRICH, Claimant Below,

Appellee,

v.

JOSEPH McCORMICK, Administrator of the Estate of James McCormick, Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

266 I.A. 606

Opinion filed May 4, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This cause is consolidated with cause No. 35441, in which the opinion states the questions involved, which are identical with the issues in this proceeding. For the reasons stated in our opinion in cause No. 35441, the order of the Circuit Court will be reversed and remanded with directions to expunge the order of reinstatement, and to allow the original order of dismissal to stand as entered.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

Opinion filed May 4, 1933

35451

WILBUR S. TRADER, Appellee, v. WINIFRED T. TRADER, Appellant.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

266 I.A. 606

Opinion filed May 4, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Under a decree for divorce entered in the Superior Court of Cook County on June 4, 1928, Wilbur S. Trader was directed to pay to Winifred T. Trader the sum of $125.00 each month as alimony until the further order of court.

Approximately two years later, Winifred T. Trader filed a petition in said court alleging that there had then become due by virtue of said decree the sum of $3,100.00, and prayed for a rule requiring Wilbur S. Trader to show cause why he should not be punished for contempt for his neglect and refusal to comply with the decree.

To this petition the respondent filed an answer in the nature of a cross-petition, alleging facts tending to show a material change in his financial circumstances, and averring further that subsequent to the entry of the decree he had given the petitioner a four and one half carat diamond ring, appraised at $3,500.00 in full settlement of alimony payments to accrue in the future, which was accepted by petitioner, and praying for a modification of the decree as to the amount required to be paid by him to petitioner.

Evidence was heard by the court upon the issues joined under the petition and cross-petition, at the conclusion of which the court entered the following order:

"This cause comes on to be heard on the continued hearing on the return of the rule to show cause, both

Opinion filed May 4, 1932

parties being represented by counsel, Court having jurisdiction and being fully advised in the premises doth find:

That no moneys are now due from cross-defendant to cross-complainant and that cross-complainant is now employed at a salary of $100 per month.

It is, therefore, ordered, adjudged and decreed that the decree for divorce heretofore entered be, and the same hereby is modified with respect to alimony; that the order in said decree providing for alimony of $125 per month, be, and the same hereby is cancelled and that cross-defendant shall hereafter pay to complainant as and for her alimony the sum of $25 per month, first payment to be made on the 15th day of August, 1931."

By this appeal, plaintiff seeks a reversal of the foregoing order, and asks that a finding and judgment be entered in favor of petitioner, or in the event that this be denied, that the cause be remanded for further hearing.

The chancellor had before him for hearing two separate matters: (1) the petition for a rule to show cause, and (2) the cross-petition to modify the original decree with reference to the payment of alimony. Manifestly, the order is improperly drawn. It recites that the cause came on to be heard on the return of the rule to show cause, but fails to include the recital that the hearing of the cross-petition was also before the court. In spite of the fact that four witnesses, testified upon the hearing, whose testimony embraced some fifty pages of the record, the findings of the order are contained in but three lines and are entirely too scant to support the decretal part of the order. It is one of the findings of the court that "no moneys are now due from cross-defendant to cross-complainant." An examination of the record discloses that there is apparently no conflict in the evidence as to the allegation that respondent was substantially $3,000.00 in arrears on his alimony payments. Notwithstanding this fact, the court finds that there are no moneys due the petitioner. The evidence is equally clear that respondent gave petitioner a valuable diamond ring shortly

after the decree for divorce was entered, alleged to have been appraised at $3,500.00. It may well be that the court intended by the foregoing finding to hold that this ring should be considered as in lieu of the arrearages in alimony, but the finding does not so state. It is too vague and uncertain. The second part of the finding, namely, that respondent "is now employed at a salary of $100 per month," is likewise insufficient. It may be true that respondent's salary has been reduced to the amount stated in the finding, but there is evidence in the record tending to show that respondent at one time owned various securities of considerable value, and the finding is conspicuously silent as to these assets.

The decretal part of the order disposes only of the cross-petition for the reduction of alimony, and makes no disposition of the petition for contempt. Respondent insists that this defect in the order justifies a dismissal of the appeal so far as it pertains to the petition for the rule to show cause. We cannot agree with this conclusion, however, and believe that the order should be reversed and remanded with directions to the chancellor that he enter an order making specific findings upon the petition and cross-petition, both of which were before him for determination, and in the decretal part of the order to be entered, make such disposition of both petitions as may be justified by the record of the proceeding.

For the reasons stated, the order of the Superior Court will, therefore, be reversed and remanded with directions to enter specific findings on both the petition and cross-petition herein, and to enter such final orders thereon as may be proper.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

35517

MILDRED RESSLER,

(Plaintiff) Appellant,

v.

FOREMAN-STATE NATIONAL BANK, a corporation,

(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

266 I.A. 606

Opinion filed May 4, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against Foreman-State National Bank to recover four certificates aggregating 145 shares of Trustees Standard Oil Shares, pledged with the bank as collateral for a loan. Upon the bank's refusal to surrender the property, plaintiff filed her declaration in trover. To this declaration defendant interposed four pleas; (1st) non cepit; (2nd) non detinet; (3rd) not guilty; and (4th) property in it, the defendant, and not in plaintiff. The court heard the cause without a jury and found the defendant not guilty, and that the right to the possession of the property was in defendant.

Briefly stated, the evidence discloses that plaintiff voluntarily turned over to one Frank O. Southbrook, her friend, benefactor and financial adviser, the four certificates in question which had previously been purchased by Southbrook for plaintiff from money, aggregating $2,050.00, won by plaintiff in an advertising picture contest conducted by a Chicago newspaper. When the certificates were delivered to Southbrook in March, 1930, plaintiff was contemplating a trip to California, and inasmuch as she was at the time indebted to Southbrook in the sum of $500.00 previously loaned by him to her, the certificates were turned over to Southbrook with a memorandum stating that they were for "safe keeping and security for loan of $500.00".

1832

ELDRED STANLEY,

(Plaintiff) Appellant,

v.

EDMUND-STATE NATIONAL BANK,

a corporation,

(Defendant) Appellee.

Opinion filed May 4, 1832

Mr. Justice Young delivered the opinion of the Court.

Plaintiff brought an action of replevin against Foreman-State National Bank to recover four certificates aggregating 140 shares of Fourteen Standard Oil shares, bearing with the bank as collateral for a loan. Upon the bank's refusal to surrender the property, plaintiff filed her declaration in trover. To this declaration defendant interposed four pleas; (1st) non cepit; (2nd) non detinet; (3rd) not guilty; and (4th) property in it, the defendant, and not in plaintiff. The cause being tried by a jury and found the defend nt not guilty, and that the right to the possession of the property was in defendant.

Briefly stated, the evidence discloses that plaintiff voluntarily placed over to one Frank C. Washburn, one Friend, banker and financial adviser, the four certificates in question which had previously been purchased by Washburn that plaintiff from money, aggregating $5,000.00, was to plaintiff in exchange existing between plaintiff and Washburn. Then the certificates were delivered to Washburn at Ward, Ind., plaintiff was accompanying a note in California, and thereupon on the time included in controversy in the sum of $4,000.00 transferred was negotiated in Chicago, and thereupon sent to Foreman-State National Bank for collateral. And thereupon plaintiff executed a note for $4,000.00, payable on demand, bearing interest at the rate of 6% per annum. Upon the execution of the note, the certificates were delivered to the bank, the defendant in error, and thereupon sent to Foreman-State National Bank for collateral. And thereupon plaintiff executed a note for $4,000.00, payable on demand, bearing interest at the rate of 6% per annum.

266 I.A. 606

During April and May, 1930, the shares evidenced by the certificates decreased in value. Rather than sell the securities to provide funds for plaintiff, Southbrook continued to loan plaintiff money and held the certificates as security for the additional loans. By June, 1930, the shares had still further depreciated in value. According to Southbrook, he was advised by the broker from whom the shares had been purchased, to equalize the depreciation by purchasing 100 additional shares. To that end Southbrook borrowed $1,200.00 from the defendant where he carried a substantial account, giving the bank as collateral security the 145 shares and the newly acquired 100 shares.

Southbrook asserts that he advised plaintiff fully of the second purchase and obtained her consent thereto before making the loan, and there is evidence both oral and written to support his contention. Plaintiff, however, denies both knowledge and consent to the purchase and loan. So far as the bank is concerned, it believed Southbrook to be the sole owner of the certificates. He was a customer of the bank, carried a substantial account there, and had possession of the certificates which were made payable to bearer and transferable by delivery. Moreover, plaintiff's name was at no time mentioned in the transaction and the bank apparently acted in good faith and without notice that plaintiff claimed any interest in the certificates.

Plaintiff seeks a reversal of the judgment on the theory that Southbrook pledged these certificates without her authority, knowledge or consent; that he converted the shares to his own use, being thereby guilty of larceny as bailee; that the bank did not acquire title to the property and was, therefore, guilty of conversion when it refused to surrender the certificates upon demand.

during April and May, 1990, the banks attempted to
the certificates deposited in vain. Rather than sell the securities
to provide funds for Plaintiff, Beechcroft borrowed $ 1000 plain-
tiff money and held the certificates as security for the existing
loans. By June, 1990, the shares had still further depreciated in
value. According to Beechcroft, he was advised by the broker that
upon the shares had been purchased, to liquidate the depreciation in
purchased 100 additional shares. In that end Beechcroft borrowed
$1,800.00 from the defendant whose he carried a margin account,
giving the bank as collateral security the 100 shares and the newly
acquired 100 shares.

Beechcroft asserts that he advised Plaintiff Lilly of
the second purchase and advised her consent thereto before making
the loan, and there is evidence both oral and written to support
his contention. Plaintiff, however, denies both knowledge and
consent to the purchase and loan. So far as the case is concerned,
it believed Beechcroft to be the sole owner of the certificates.
He was a customer of the bank, carried a substantial account there,
and had possession of the certificates which were made payable to
bearer and transferable by delivery. However, plaintiff's name
was at no time mentioned in the transaction and the bank apparently
acted in good faith and without notice that plaintiff claimed any
interest in the certificates.

Plaintiff seeks a recovery of the judgment on the ground
that Beechcroft pledged those certificates without her authority,
being clearly guilty of larceny as bailee; that the bank did not
knowingly or innocently become involved; that it be declared the owner
to provide funds for plaintiff, Beechcroft borrowed to loan plain-
tiff money and held the certificates as security for the existing
loans. By June, 1990, the shares had still further depreciated in
value. According to Beechcroft, he was advised by the broker that
upon the shares had been purchased, to liquidate the depreciation in
purchased 100 additional shares. In that end Beechcroft borrowed
$1,800.00 from the defendant whose he carried a margin account,
giving the bank as collateral security the 100 shares and the newly
acquired 100 shares.

Beechcroft asserts that he advised Plaintiff Lilly of
the second purchase and advised her consent thereto before making
the loan, and there is evidence both oral and written to support
his contention. Plaintiff, however, denies both knowledge and
consent to the purchase and loan. So far as the case is concerned,
it believed Beechcroft to be the sole owner of the certificates.
He was a customer of the bank, carried a substantial account there,
and had possession of the certificates which were made payable to
bearer and transferable by delivery. However, plaintiff's name
was at no time mentioned in the transaction and the bank apparently
acted in good faith and without notice that plaintiff claimed any
interest in the certificates.

Plaintiff seeks a recovery of the judgment on the ground
that Beechcroft pledged those certificates without her authority,
being clearly guilty of larceny as bailee; that the bank did not
knowingly or innocently become involved; that it be declared the owner

The trial court in entering judgment, evidently found, as a matter of fact, that the transfer of the certificates from Southbrook to the bank was made with the knowledge and approval of plaintiff. We have carefully examined the record upon this controverted question of fact, and notwithstanding the assertion of plaintiff that she had no knowledge of the transaction, we find sufficient evidence to sustain the court's finding. As has frequently been said, the opportunities of the trial judge for observing the witnesses and determining their credibility, are superior to those of a reviewing court, and weight must and should be given to the conclusions of the trial judge upon disputed questions of fact. The court of review will, therefore, proceed with reluctance to disturb the findings of fact, unless they are manifestly contrary to the clear probative force of the evidence. Branstetter Motor Company v. Silverberg, 140 Ill. App. 451.

Plaintiff's brief contains numerous citations where it was held that the owner of a stolen chattel may recover the same from a third person even though that person be a bona fide purchaser for value, and great reliance is apparently placed upon the doctrine enunciated in those cases. While that may be a sound rule of law, it has no application to the facts of this case. The record here does not present a question of whether the owner of stolen property can maintain an action against one who has innocently purchased it from a felon. There is no such element in the case. Southbrook and Mildred Bessler, the plaintiff, maintained a friendly relationship to each other during the entire period covered by these transactions and long after the certificates were pledged as collateral with the bank. Southbrook acquired possession of the shares rightfully and was in no sense a felon or a holder of stolen property, as defined in the decisions cited in plaintiff's brief.

The trial court in entering judgment, evidently found, as a matter of fact, that the standard of the certificates from Smithcock to the bank was more than the knowledge and acquiesence of plaintiff. It does naturally exercise the trier upon its conflicting question of fact, and notwithstanding the assertion of plaintiff that she had no knowledge of the transaction, we find sufficient evidence to sustain the court's finding. It does frequently seem hard, the circumstance of the trial judge for observing the witnesses and determining their credibility, are material to those of a reviewing court, and weight must and should be given to the conclusions of the trial judge upon disputed questions of fact. The court of review will, therefore, proceed with reluctance to disturb the findings of fact, unless they are manifestly contrary to the clear preponderating force of the evidence. Pennsylvania Motor Commerce v. Williamson, 140 Ill. App. 487.

Plaintiff's brief contains numerous citations where it was held that the owner of a stolen chattel may recover the same from a third person even though that person be a bona fide purchaser for value, and first inquires is constantly placed upon the question submitted in those cases. While that may be a sound rule of law, it has no application to the facts of this case. The record here does not present a question of whether the owner of stolen property can maintain replevin as against one who purchased it from a thief. There is no such element in the case. Smithcock was fitting jewelry, the plaintiff, entrusted a friendly relationship to exist during the entire period covered by these transactions, and long after the certificates were placed in the bank. Smithcock received payment for the articles sold in the usual course of business, and plaintiff's brief

In addition to the controverted question of fact which was resolved in favor of defendant, the bank argues earnestly that even if plaintiff did not give her prior consent to the transfer, nevertheless, the bank being a purchaser for value in good faith of negotiable instruments payable to bearer, obtained good title to the certificates as against plaintiff. The consideration of this question involves many provisions of the Trustees Standard Oil Shares certificates, and the laws of the states of New York and Illinois applicable to the transfer by delivery of negotiable instruments. In view of our conclusion as to the facts in the case, we consider it unnecessary to discuss this proposition.

We believe the judgment was properly entered in favor of defendant, and the same will accordingly be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

In addition to the controverted question of fact which was resolved in favor of defendant, the bank raises extremely hard questions. Although it did not file any answer to the transfer, even if plaintiff did not file any answer to the transfer, nevertheless, the bank acted a fiduciary for value in good faith of negotiable instruments payable to bearer, obtained good title to the certificates as against plaintiff. The consideration of this question involves many provisions of the Uniform Stock and Bonds certificates, and the laws of the states of Ohio and Illinois applicable to the transfer by delivery of negotiable instruments. In view of our conclusion as to the facts in the case, we consider it unnecessary to discuss this proposition.

We believe the judgment was correctly entered in favor of defendant, and the same will accordingly be affirmed.

Affirmed.

Green, P.J. and Crawford, J. concur.

35563

JAMES KONZ,

Appellee,

v.

TOWLE NASH MOTOR SALES, INC., a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

266 I.A. 606

Opinion filed May 4, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

James Konz purchased from defendant a Nash automobile under a written agreement executed in duplicate. One Krarup, salesman for defendant, who negotiated the sale, inserted in the copy of agreement delivered to plaintiff the following clause;

> "In case of Eight coming out in same price class before six months, we will take car in trade at One Hundred Dollars depreciation."

This clause was not contained in the original contract retained by defendant. Neither did the defendant have notice of the existence of the foregoing notation in plaintiff's duplicate copy of the agreement. Shortly before the expiration of the six months period, plaintiff appeared at the office of defendant and told N. L. Towle, president of defendant company, that he was ready to purchase one of the new eight cylinder cars, which had just been brought out by the Nash Motor Company, and then exhibited to Towle the contract executed by Krarup as sales manager of the defendant corporation. Towle examined the original contract contained in defendant's file and found that the offending clause was missing therefrom. He thereupon notified plaintiff that Krarup was not sales manager, never had been and was without authority to insert any special provision in the printed form of contract used by defendant; that the company would not comply with the terms of the contract and advised Konz that instead of accepting his car in trade at $100.00 depreciation for a new eight cylinder Nash, they would take it in trade at a depreciation of $450.00.

Opinion filed May 4, 1932

266 I.A. 606

Plaintiff thereupon instituted suit, and in his statement of claim alleged the contract with the clause inserted by Krarup, alleged a tender of the automobile together with the sum of $100.00, and a demand by plaintiff for delivery of a new eight cylinder Nash, as well as the refusal of the defendant to comply with the agreement. Plaintiff's statement of claim further alleges the offer of defendant to allow plaintiff the sales value of his old car less a depreciation of $450.00 instead of $100.00 as provided in the contract.

To this statement of claim, defendant filed an affidavit of merits averring in substance that in April, 1930, it had in its employ a salesman named Krarup; that the bill of sale issued by Krarup to plaintiff, on its face recites among other things, that the same shall not be binding upon the defendant until approved by an officer of the company; that the bill of sale as prepared by Krarup was never presented for approval to defendant, but on the contrary that he caused to be written upon the original of the bill of sale the clause aforementioned, without the knowledge and approval of defendant, and that defendant had no knowledge thereof until attention was called thereto a considerable time thereafter.

On appeal to this court, defendant has apparently abandoned the only defense interposed by its affidavit of merits, for counsel says in the initial paragraph of its brief that "unfortunately Krarup was the agent of appellant and since the car sold on April 29, 1930 to Konz was delivered, appellant must be held to have ratified Krarup's act." The ground now urged for reversal is that plaintiff failed to make a proper tender of performance and that before recovery can be had it is necessary to aver and prove performance or tender of performance by plaintiff.

The rule is well settled that facts alleged in a statement of claim and not denied by the affidavit of merits are admitted to be true. Cooper v. Anderson, 246 Ill. App. 1. Plaintiff by his statement of claim alleges tender and also avers that defendant refused to credit him with the sales value of his old car less $100.00, as provided in his agreement, and offered to make the trade at a depreciation of $450.00 on plaintiff's old automobile. These facts being sufficiently alleged and not denied must be taken as true. Defendant tried its case below on the theory that Krarup clandestinely inserted the offending clause in plaintiff's copy of the contract, without defendant's knowledge and without authority to do so, and since this defense is abandoned on appeal and the question of authority is conceded by the statement in defendant's brief, there remains nothing further for our consideration. A party cannot try a case on one theory in the trial court and on another theory in a court of review. Chicago Title & Trust Co. v. De Lesaux, 336 Ill. 522.

For the reasons stated, the judgment of the trial court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON J. CONCUR.

The rule is well settled that facts alleged in a state-
ment of claim will not demand by the affidavits of merits are admitted
to be true. Cheever v. Jamieson, [1] Ex. [illegible] by the
statement of claim alleges fraud and also avers that defendant
refused to credit him with the sales value of his car but less
$100.00, as provided in the agreement, and offered to make the
trade at a depreciation of $150.00 on plaintiff's automobile.
These facts being sufficiently alleged and not denied must be taken
as true. Defendant cites its case below on the theory that Master
significantly inserted the clause in plaintiff's reply
of the contract, without defendant's knowledge and against authority
to do so, and since this defense is abandoned on appeal and the
question of authority is conceded by the statement in defendant's
brief, there remains nothing together for our consideration. I
hardly cannot try a case on one theory in the trial court and in
another theory in a court of review. Chicago [illegible] & Trust Co. v.
De Leeuw, 256 Ill. 302.

For the reasons stated, the judgment of the trial court
will be affirmed.

AFFIRMED.

Hebel, P.J. and Stouder, J. concur.

35313

ALMA PARMENTER,

(Plaintiff) Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

266 I.A. 606

Opinion filed May 4, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Circuit Court in the amount of $4,500, against the City of Chicago, a municipal corporation, by reason of injuries sustained through a fall upon one of the sidewalks under the control of the defendant. The theory of the declaration appears to be that the defendant negligently and carelessly permitted snow and ice to accumulate on the sidewalk where the accident happened, so that by reason thereof it became rough and uneven and formed an obstruction which was dangerous to pedestrians using the sidewalk; that this condition had existed for a long time prior to the accident and that the defendant knew of the condition or by the exercise of reasonable care should have known.

Plaintiff testified that she was a housekeeper and on January 23, 1929, at about the hour of 5:30 in the afternoon, she was walking west on Irving Park Boulevard along the sidewalk on the south side of the street; that it was dark although the street lights were lighted; that when she got near Elston avenue she stepped on a hill of ice and slipped and fell; that ice was piled on both sides of the walk and had formed ridges; that she had walked over this sidewalk the week preceding January 23, but that on the occasion in question she did not see the hill of ice as she approached it; that the hill of ice was about a foot high and her foot did not go over the obstruction, but must have stopped part way up the ice ridge and then slipped back and she fell.

Opinion filed May 4, 1933

Bertha Tobey, a witness for the plaintiff, testified that on or about January, 15, she had walked over this particular sidewalk at the point in question and that the snow and ice was piled up on both sides and that there was a sort of groove between caused by people walking in the center of the walk; that the condition of the snow and ice caused the sidewalk to be hilly and slippery and covered with small hills or ridges of ice; that it was impossible to walk along said sidewalk except in this particular groove.

A witness for the plaintiff, Joseph H. Gerken, testified that this icy condition had existed for about 6 weeks prior to January 23, 1929.

As a result of the accident plaintiff suffered a fracture of the fibula and an oblique fracture of the tibia and the articular surface of the tibia extended upwards and backwards for a distance of about two inches. The ankle was displaced downwards and backwards from the articular surface. The plaintiff was in the hospital for two months and the fracture was set on four different occasions. Upon leaving the hospital she was not able to walk, but was compelled to use a wheel chair and had her ankle in a cast for about three months. She still suffers pain and the ankle stiffens when used.

A municipality is not liable for ice and snow upon its sidewalks unless there are other circumstances which enter into the case which create a liability. Injuries to persons caused by falling on ice or snow on the sidewalks are not infrequent and mere slipperiness is not such a defect in a sidewalk as will create a liability on the part of a municipal corporation. Where, however, ice has formed into hillocks or ridges and thereby has created a condition which amounts to an obstruction, a municipality after due notice is liable if it suffers this condition to remain. City of Quincy v. Barker, 81 Ill. 300; Eppley v. City of Chicago, 221 Ill. App. 111; Hobbs v. City of Chicago, 248 Ill. App. 183.

No evidence was introduced in the case at bar on behalf of the defendant. From the evidence adduced on behalf of the plaintiff it appears that the surface of the sidewalk at the place of the accident was rough and uneven, and covered with hills and ridges of ice and snow. Pedestrians using the sidewalk had worn a pathway through the ice and snow along the sidewalk at this particular point, interspersed with ridges, hills and hollows. This condition had evidently existed for a long period of time and of sufficient duration to have enabled the city to have had notice.

The question as to whether or not the plaintiff at the time of the accident was in the exercise of ordinary care for her own safety, was one of fact for the jury. From the evidence it appears that others had been using the sidewalk in the same manner at this particular place.

Under all the circumstances as shown by the evidence, the cause was properly submitted to the jury for its consideration. The injury sustained was a severe one and the damages in our opinion are not excessive.

The refusal of the court to give instruction number 15 was not error. This was an abstract proposition of law and was covered fully by the other instructions given.

We see no reason for disturbing the verdict and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

no evidence was introduced in the case at bar on
behalf of the defendant. From the evidence adduced on behalf of
the plaintiff it appears that one section of the sidewalk at the
place of the accident was rough and uneven, and contained with brick
and ridges of ice and snow. Photographs using the sidewalk and
note a pathway through the ice and snow along the sidewalk of this
particular point, intersections with ridges, hills and hollows.
This condition had evidently existed for a long period of time and
of sufficient duration to have apprised the city to have had notice.

The question as to whether or not the plaintiff at
the time of the accident was in the exercise of ordinary care for
her own safety, was one at least for the jury. From the evidence
it appears that others had been using the sidewalk at the exact opposite
at this particular place.

Under all the circumstances as shown by the evidence,
the cause was properly submitted to the jury for its consideration.
The injury sustained was a result one and the inference in our opinion
are not unreasonable.

The refusal of the court to give instruction number 12
was not error. This was an abstract proposition of law and was
covered fully by the other instructions given.

We see no reason for disturbing the verdict and the
judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BREEN, P.J. AND ATKINS, J. CONCUR.

35445

HOME BANK AND TRUST COMPANY, a corporation,
(Complainant) Appellee,

v.

TEKLA DZIADULEWICZ, et al.,
STANLEY ADAMSKI, impleaded,
(Defendant) Appellant.

STANLEY ADAMSKI,
(Cross-Complainant)
Appellant,

v.

HOME BANK & TRUST COMPANY, a corporation, impleaded, etc.,

(Cross-Defendant)
Appellee.

7 5 7

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

266 I.A. 607

Opinion filed May 4, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The Home Bank and Trust Company filed its bill in the Superior Court to foreclose a trust deed executed by Tekla Dziadulewicz and Matt Dziadulewicz to Andrew C. Bisek, Trustee, dated October 7, 1925, and recorded December 2, 1925, as Document 9113269.

The bill alleges that the complainant is the owner of a principle note for $4,000 and three coupon notes for $120 each, which it is alleged are secured by the trust deed in question; that the principal is past due and that none of the coupons have been paid; that by reason of an error of the scrivener the trust deed states that it is to secure an indebtedness of $1,800 instead of $4,000; that there was an error in the principal note held by the bank in that it purports to be secured by a trust deed to "Agnes B. Bisek" instead of "Andrew C. Bisek". The bill also prays for a reformation of the principal note, coupon notes and the trust deed.

At the time of the filing of the bill the property was owned by one Albert Labus and his wife and by their answer they deny that the principal and interest notes are due, but admit that the

Opinion filed May 4, 1933

trust deed secures an indebtedness of $4,000 instead of $1,800.

The defendant Stanley Adamski filed his answer denying that the complainant was the owner of the notes secured by the trust deed in question and further answering charges that he is the real owner and holder of the note for $4,000. That the note was given as part of the purchase price for the property; that the trust deed in question is not now in his possession but was delivered to one Andrew C. Bisek by him for the purpose of having it recorded.

The cause was referred by the chancellor to a master in chancery who took evidence and found the issues in favor of the complainant. These findings were approved by the chancellor and a decree entered finding the issues in favor of the complainant and against the defendant Adamski.

From the facts it appears that Adamski was the owner of the premises in question and on October 7, 1925, conveyed the property to Dziadulewicz and received back a note for $4,000, together with three coupon notes and a trust deed, recorded later as Document 9113269. The transaction took place at the office of an attorney named Andrew C. Bisek who represented both parties in the deal. At the time the transaction was closed on October 7, 1925, at Bisek's office, Tekla Dziadulewicz, the wife of Matt Dziadulewicz, was not present and Bisek kept the notes and trust deed for the purpose of having them signed by her. This she did later.

At this time Bisek was indebted to the Home Bank & Trust Company in the sum of $1,900. On or about October 16, 1925, he executed a new note payable to the bank for the sum of $2,300 and pledged the principal note and the coupon notes signed by Matt Dziadulewicz and Tekla Dziadulewicz, which on their face purported to be secured by a trust deed to Agnes Bisek. These notes pledged as collateral security by Bisek and signed by Matt Dziadulewicz and

Tekla Dziadulewicz were the first and the original notes executed and delivered by them to secure the purchase price for the property received by them from the defendant Adamski. At the same time that Bisek renewed his loan at the bank and deposited the notes of Matt and Tekla Dziadulewicz, he took down certain other securities held by the bank and the bank accepted the new collateral as security for its loan. The trust deed in which Andrew C. Bisek was named as trustee, but which was executed at the same time as the notes deposited as collateral security with the bank, was not turned over to the bank at this time, but appears to have been deposited with the bank as additional security together with the notes already held by it on or about May 14, 1926. The time is evidenced by a notation on the trust deed as follows: "Left at H. B. May 14th, 1926." It could be assumed that the "H.B." indicated the Home Bank.

October 7, 1925, when the deal was completed between Adamski and Dziadulewicz at Bisek's office, the trust deed was delivered to Adamski who later discovered that it described the principal note as for $1,800 instead of $4,000 and he took it back to Bisek who promised to see to it that it was corrected.

In the early part of December 1925, and after Bisek had deposited the original principal and coupon notes with the bank as security for his loan, he prevailed upon Dziadulewicz and his wife to execute another and different trust deed and also a second set of principal and coupon notes. Although this trust deed and the coupon notes were executed in December, they were antedated as of October 7, 1925. This second trust deed, together with the principal and coupon notes were turned over to Adamski and it is upon these documents that the defendant Adamski relies in this proceeding.

April 21, 1927, Bisek signed a letter directed to the Home Bank and Trust Company directing the bank to pay Adamski the excess over the amount due it after his, Bisek's personal loan

had been satisfied. This is in effect what the decree entered in the proceeding directed should be done.

In the decree the chancellor found the issues in favor of the complainant and that there was due $2,968.99, together with costs, master's fees and interest from April 25, 1930; that the notes held by the complainant were secured by the trust deed to Andrew C. Bisek, trustee, Document 9113369, and decreed that the balance after the foreclosure proceeding be paid to Adamski, defendant and cross-complainant.

Very simply stated, we find the facts to be that the complainant is the holder of the first and original set of notes and trust deed executed October 7, 1925, at Bisek's office and that Adamski is the owner and holder of the duplicate set of notes and trust deed executed in the early part of December, but antedated as of October 7, 1925.

It is undisputed that Bisek, the attorney, is guilty of gross fraud in the procuring of the duplicate set of notes and throughout the entire transaction. It also appears from the record that he was acting as attorney for both Dziadulewicz and Adamski in the transaction.

It is insisted on behalf of the defendant and cross-complainant Adamski that the complainant is not a bona fide holder for value of the notes secured by the trust deed being foreclosed, and that the burden is upon the complainant to show that it is such bona fide holder. It is further insisted that, even though the original transaction on the part of the complainant may have been in good faith, nevertheless, upon the receipt of the trust deed in which it appeared that Andrew C. Bisek was trustee, which was sometime in May, 1926, it was placed upon notice and should have taken steps to collect its indebtedness from the personal account of Bisek in the bank before resorting to the notes and trust deed

had been effected. This is to direct that the decree mentioned in the proceeding directed should be done.

In the matter the Commission found the reasons to have merit. Section 2(1)(a) of the Act defines 'agreement' to include any arrangement or understanding that is enforceable by legal proceedings. Section 4(1) prohibits any agreement which has the purpose or effect of substantially lessening competition in any market. Section 4(2) provides that a corporation shall be deemed to have given effect to a contract, arrangement or understanding where it has engaged in any conduct in accordance with the terms of such contract, arrangement or understanding. Section 4(3) provides that a corporation shall be deemed to have engaged in any conduct where it has induced any person to engage in such conduct.

The Commission found that the respondent had entered into an agreement with Mr Ian Hall and Mr Peter Hall, directors of Hall Bros Transport Pty Ltd, whereby the respondent would not operate a transport business between Melbourne and Sydney for a period of 5 years from 1 January 1977. The respondent had also induced Hall Bros Transport Pty Ltd to enter into a similar agreement with it. The Commission found that the agreements had the purpose of substantially lessening competition in the market for the transport of goods by road between Melbourne and Sydney.

The Commission found that the agreements were entered into in order to settle proceedings instituted by the respondent against Hall Bros Transport Pty Ltd in the Supreme Court of Victoria. The Commission found that the respondent had commenced proceedings in the Supreme Court of Victoria against Hall Bros Transport Pty Ltd on 1 December 1976 claiming damages for breach of contract and for an injunction restraining Hall Bros Transport Pty Ltd from breaching the contract. The Commission found that the respondent had entered into the agreements with Hall Bros Transport Pty Ltd and Messrs Ian and Peter Hall in order to settle the proceedings instituted by the respondent against Hall Bros Transport Pty Ltd in the Supreme Court of Victoria.

The Commission found that the agreements had the effect of substantially lessening competition in the market for the transport of goods by road between Melbourne and Sydney. The Commission found that the agreements had the effect of substantially lessening competition in the market for the transport of goods by road between Melbourne and Sydney because they removed the respondent as a competitor in that market.

The Commission found that the agreements had the effect of substantially lessening competition in the market for the transport of goods by road between Melbourne and Sydney because they removed Hall Bros Transport Pty Ltd as a competitor in that market.

The Commission found that the agreements had the effect of substantially lessening competition in the market for the transport of goods by road between Melbourne and Sydney because they removed Messrs Ian and Peter Hall as competitors in that market.

The Commission found that the agreements had the effect of substantially lessening competition in the market for the transport of goods by road between Melbourne and Sydney because they removed Hall Bros Transport Pty Ltd, Messrs Ian and Peter Hall as competitors in that market.

held by it as collateral. That by extending the loan after notice that Bisek was the trustee named in the trust deed, it was guilty of gross negligence and exhibited bad faith.

On October 16, 1925, at the time Bisek procured a new loan from the complainant and deposited the principal and coupon notes executed by Dziadulewicz and his wife, these were the only notes purported to be secured by a trust deed on real estate. These notes were in fact secured by the trust deed executed at the same time and against the property in question. If there had been no duplicate notes and trust deed there is no question but what the trust deed executed October 7, 1925, would have been binding and enforceable even though there was a misdescription as to the trustee mentioned in the notes. The mere fact that the name Agnes Bisek appeared in the notes and Andrew Bisek in the trust deed would not have been sufficient to defeat the security. This court held in the case of Tollifsen v. Middle States Inv. Co., 253 Ill. App.320, that where one took notes secured by a trust deed from the trustee named in said trust deed, it raised a question of fact as to whether or not the transaction was in good faith and that under such circumstances the one who took the notes was put upon inquiry as to whether or not the trustee had the right to negotiate the notes. In the case at bar, however, the notes failed to disclose the fact that the trustee named in the trust deed was the person who negotiated the loan. The notes were payable to the order of the makers and by them endorsed, and on their face purported to be secured by a trust deed to Agnes Bisek and not to Andrew Bisek. While this might be sufficient to attract the attention of the one who took the notes, it can not be said that it would be sufficient to put the purchaser of the notes upon inquiry. The chancellor found in the decree that the complainant was a bona fide purchaser for value and in the absence of any evidence other than the facts stated, we are of the opinion that this was correct.

A much more serious situation, however, arises when it appears from the evidence that the complainant subsequently renewed Bisek's note after receipt of the trust deed which discloses the fact that Bisek was the trustee named therein. At the time the original loan was made complainant gave up certain other collateral and was, consequently, placed in a disadvantageous position with regard to the security in its possession. It had parted with a valuable security and had accepted in goodfaith another and different collateral, namely the notes secured by the trust deed executed to Bisek.

It is insisted that Adamski, by permitting the notes and the trust deed to be and remain in the hands of Bisek, his attorney, had placed the power in the hands of another to execute a fraud upon complainants. Vetesnik v. Magull, 347 Ill. 611. On the other hand it is not unusual for persons to rely upon the good faith of attorneys and it was not to be anticipated by Adamski that his attorney would be guilty of the fraud which subsequently developed. The evidence discloses, however, that Adamski did not make any effort to obtain the notes until sometime in December, over two months after the transaction in question. There is some question as to whether or not he was diligent in waiting this length of time in order to have the notes signed by the wife of Dziadulewicz. If he had made inquiry promptly he would have discovered from Dziadulewicz that the notes had been signed and it would be incumbent upon him to find out what became of them. This court in the case of Kimbell Trust & Sav. Bank v. Hartford Acc. & Ind. Co. 248 Ill.App.23, held that the acceptance of a new note given in lieu of the original note at its maturity works a payment of the original note, and that the retention of collateral which secured the original note constituted a redelivery of such collateral at the time of the execution of the new note. It is urged that by renewing Bisek's note and

accepting a delivery of the collateral after the receipt of the trust deed in which Bisek was named as trustee, the complainant had, in fact, entered into a new transaction and had notice of the fact that Bisek was trustee, and that the complainant was, therefore, placed upon inquiry as to the bona fides of the transaction. It is also insisted that at the time of the execution of the new note Bisek had funds on deposit with the complainant bank which would have greatly diminished the amount of his loan if the deposits had been applied to his indebtedness at the bank; that the bank should have done this and was guilty of bad faith in not so doing. Tollifsen v. Middle States Inv. Co., supra, is cited in support of this position.

Whether or not the bank acted in good faith in the transaction was a question of fact which must necessarily have been considered by the chancellor in arriving at his decision in the cause. It cannot be said as a matter of law that this constituted notice of any infirmity, but is a question of fact which should be considered. In this connection it may be said that the bank had already had these notes 7 months before the trust deed was deposited with it as additional collateral. During that time it had been lulled into a sense of security and we may assume that this transaction was one of innumerable transactions which the ordinary bank has to handle in the course of its business. Its attention would not be directed to the trust deed at the time it received it as collateral security with the same force and definiteness with which its attention would have been called to it at the time of the making of an original loan. No papers were executed at the time and it was simply received as a paper to be filed in connection with the original loan and there is no evidence that it was called to the attention of any of the officials of the bank or any one in authority.

Labus, the present holder of the equity, paid the first interest at complainant's bank and afterwards paid the interest to Adamski. Some point is made that the bank if it had demanded a

payment of the additional interest would have found out from Labus that Adamski claimed to be the owner of the trust deed and notes. On the other hand, it may be said that Labus first having paid the interest at the bank would have added to their sense of security and so long as Bisek paid the interest on his own note the bank was not concerned with enforcing the payment of interest notes held by it. The principal note executed by Dziadulewicz and his wife was still not due at the time the complainant renewed Bisek's note for the last time. Consequently, the complainant was still a holder for value before maturity, The fraudulent acts of Bisek created a condition, as a result of which a great hardship has necessarily resulted to one of two parties to the litigation.

The master found the equities in favor of the complainant and this finding was approved by the chancellor in his decree. The decree also found that the complainant had no notice at the time it received the notes and trust deed that anyone had any claim to these instruments. This was a question of fact and we do not feel called upon to disturb the finding of the chancellor as embodied in his decree.

For the reasons stated in this opinion the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

35454

ANNA OLITZKY,

Plaintiff - Appellee,

v.

MOLLY BLOOM and PAUL BLOOM,

Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

266 I.A. 607

Opinion filed May 4, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal to review a judgment of the Superior Court of Cook County entered upon the finding of the court confirming a judgment by confession against the defendants, Molly Bloom and Paul Bloom. The original judgment by confession was based upon 17 promissory notes executed by the defendants, Molly Bloom and Paul Bloom, her husband, secured by a trust deed on certain real estate situated in Cook County, Illinois, the title to which property was in the defendant Molly Bloom and had been since the first day of October, 1926. The defendants filed their petition asking to have the judgment by confession set aside and leave was granted the defendants to appear and defend.

From the facts it appears that title to the property was in the defendant Molly Bloom but that, in fact, the true owners of the property were Beki Noosband and Morris Noosband, her husband; that the defendant Molly Bloom had no interest in the property other than trustee for Beki Noosband and Morris Noosband; that at the time of the execution of the notes in question the defendant Molly Bloom was in bed recovering from an attack of the "flu" and that one Sam Kosova, the husband of the plaintiff, went to defendants' home, together with the Noosbands and induced the defendant, Molly Bloom, after a considerable amount of coaxing and persuasion to sign the trust deed in question and a series of notes aggregating $5,400.00, in order to enable the Noosbands to obtain a loan from Sam Kosova

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for the sum of $5,000; that the said plaintiff Anna Olitzky is, in fact, the wife of Sam Kosova and has brought this suit in her maiden name.

It is claimed by defendant as a defense that plaintiff is not, in fact, a bona fide holder of the notes for value; that this transaction took place on the 22nd of June, 1928, and that the sum of $5,000 was paid to the Noosbands and that the said Sam Kosova knew that the defendants had no interest in the real estate and received no money by reason of the execution and delivery of the notes in question and consequently there was no consideration.

A similar judgment was confessed in the Municipal Court of Chicago, in favor of Sam Kosova, the husband of the plaintiff, on similar notes executed at the same time, and the judgment by confession in that case was set aside and upon a final hearing the issues were decided in favor of the defendants. That judgment in the Municipal Court was advanced as res adjudicata of the cause pending in the Superior Court. The cause entitled Sam Kosova v. Molly Bloom and Paul Bloom, No. 30565, is now in this court on appeal and consolidated with this proceeding.

It is not denied that the defendants signed the notes in question and that they were delivered after their execution to Sam Kosova and that the said Sam Kosova paid the sum of $5,000 to the Noosbands as a consideration for said notes. Such being the facts, the burden was upon the defendants to establish their defense by a preponderance of the evidence.

From the evidence of the defendant Molly Bloom, it appears that the Noosbands asked her to take title to the property in her name because someone might sue them and that she consented, and in fact never herself paid any money for the property; that on the 22nds of

for the sum of $5,000; that the said Merrill then pitiably is, in
fact, the wife of Ben Cowers and the accept this writ in her
maiden name.

It is claimed by defendant on a defense that plaintiff
is not, in fact, a bona fide holder of the notes for value; that this
transaction took place on the 22nd of June, 1929, and that the sum
of $5,000 was paid to the boosterds and that the said Sam Lowers knew
that the defendants had no interest in the real estate and received
no money by reason of the execution and delivery of the notes in
question and consequently there was no consideration.

A similar judgment was entered in the Municipal Court
of Chicago, in favor of Sam Lowers, the husband of the plaintiff, on
similar notes executed at the same time and the judgment by confession
in that case was set aside and upon a final hearing the issues were
decided in favor of the defendants. That judgment is the Municipal
Court was advanced on the calendars of the cause pending in the
Superior Court. The cause entitled Sam Lowers v. Polly Bloom and
Paul Bloom, No. 31868, is now in this court on appeal and consolidated
with this proceeding.

It is not denied that the defendants signed the notes in
question and that they were delivered after their execution to the
Lowers and that the said Ben Lowers paid the sum of $5,000 to the
boosbends as a consideration for said notes. Such being the facts,
the burden was upon the defendants to establish their defense by a
preponderance of the evidence.

From the evidence of the defendant Polly Bloom, it appears
that the boosbends asked her to take title to the property in her
name because rumores might are then and that she consented, and in fact
never personally paid any money for the property; that on the finds of

June, 1928, she was sick in bed and that Sam Kosova and the Noosbands came into her room and began trying to persuade her to sign the mortgage and notes; that she was not well at the time and was weak, but that they insisted that she sign and assured her that she would not be required to pay a cent if she would sign the notes and mortgage. It appears further from the evidence that her husband Paul Bloom signed the same notes and mortgage in her room after they had been signed by her. It also appears from the evidence that in October, 1926, the defendant Molly Bloom signed a similar trust deed and notes and at that time the Noosbands obtained money on the strength of these notes and the trust deed so signed by her. No effort appears to have been made by the defendants to repudiate the transaction from the time of the signing of the notes involved in this proceeding in June, 1928, until the obtaining of the judgment by confession on February 1, 1930.

There was no such duress or fraud in the obtaining of the signature of Molly Bloom as would invalidate the notes in question. It is evident that she signed the notes at the request of the owners of the property and if she had not cared to assume the responsibility of so doing, she could very easily have conveyed the property to the real owners. She appears to have been willing to lend her name as title holder to the property to protect someone else. On a previous occasion she also appears to have signed a similar mortgage together with the notes secured by it. Her husband was with her at the time of the proceeding and subsequently signed the notes with a knowledge of all the facts concerning the transaction. There was no relationship existing between the plaintiff and defendants which created any special duty. There was no infirmity of mind on the part of the defendant Molly Bloom which would raise any presumption that she was not aware of what she was doing. There was a sufficient consideration to support the validity of the notes in question. Kosova

June, 1928" she was sick in bed and that Mrs Evans and the Longmans
came into her room and began talking to Florence but as she
mortgage and money; that she was not well at the time and was weak,
but that they Insisted that she sign and assured her this she would
not be required to pay it once if she would sign the notes and mortgage.
It appears further from the evidence that Mrs Longmans [illegible] then went
signed the same notes and mortgage in her room after that and went
signed by her. It also appears from the evidence that on December,
1928, the defendant Emily Evans signed a similar mortgage and notes
and at that time the consideration obtained solely by the interest of
these notes and the first ones to signed by her. As client by whom
to have been made by the defendants to substitute the transaction these
the time of the signing of the notes mentioned in this connection is
June, 1928, until the execution of the judgment by confession on
December 1, 1930.

There was no such interest or trust in the obtaining of
the signatures of Emily Evans on said Promissory [illegible] the notes in
question. It is evident that she signed the notes at the request of
the owners of the property and if she had not acted in signing the
responsibility of to pay, the notes would surely have remained the
property in the trust company. She signed in her good ability to [illegible]
for them as their helper in the capacity to receive payments [illegible]. On
a previous occasion she also signed to help signing a similar mortgage
together with the notes mentioned in it. That [illegible] was with [illegible] v
the time of the [illegible] and approximately signed the notes with v
knowledge of all the facts surrounding the transaction. There was no
deliberate attempt between the plaintiff and defendants acting
[illegible] and [illegible] to defraud or wind up the just
created and [illegible] debt. There was no fraudulent or wind up the just
of the defendant Emily Evans which [illegible] that
she was not aware of what she was doing. There was a sufficient
consideration to support the validity of the notes in question. Counsel

parted with his money on the strength of defendants' signatures to the notes and trust deed. Harris v. Harris, 180 Ill. 157.

It is insisted that defendants signed the notes only as an accommodation. Accommodation paper may be sold or negotiated for the benefit of the person accommodated, and if for a valuable consideration, it is good as against the maker. Drumm Construction Co. v. Mickel, 225 Ill. App. 580.

An attempt was made to show that there was an agreement to the effect that the defendant Molly Bloom was not to be held liable on the notes. The trial court found otherwise. Moreover, the notes on their face implied a consideration and an agreement to pay. The J. L. Mott Iron Works v. Rosenzweig, et al. 211 Ill. App. 430.

It is insisted that by reason of Sam Kosova receiving a commission of $400 for making the loan, that the transaction is usurious. This, however, would not be binding on the plaintiff in this cause as there is no evidence in the record showing her knowledge of such an agreement.

The cause was tried before the court without a jury and the court found the issues in favor of the plaintiff and against the defendants and we see no reason for disturbing the finding and judgment.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

pleted with his money on the strength of defendants' signatures to the notes and trust deed. Smith v. Byrnes, 180 Ill. 187.

It is insisted that defendants signed the notes only as an accommodation. Accommodation paper may be sold or negotiated for the benefit of the person accommodated, and if for a valuable consideration, it is good as against the maker. Brown Construction Co. v. Kiekel, 248 Ill. App. 480.

An attempt was made to show that there was an agreement to the effect that the defendant Emily Simon was not to be held liable on the notes. The trial court found otherwise. However, the notes on their face imported a consideration and no agreement to pay. The 1. L. Nott Iron Works v. Vandervoort, et al. 211 Ill. App. 480.

It is insisted that by reason of the leases executing a commission of $600 for making the loan, that the transaction is usurious. This, however, would not be binding on the plaintiff in this cause as there is no evidence in the record showing her knowledge of such an agreement.

The cause was tried before the court without a jury and the court found the issues in favor of the plaintiff and against the defendants and we see no reason for disturbing the finding and judgment.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

Judgment affirmed.

Burke, P.J., Lee Sullens, J., concur.

35502

LAWRENCE M. EILERT,

(Plaintiff) Appellee,

v.

ANDREW A. ROSENCRANS and ROY ROSENCRANS,

(Defendants) Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

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266 I.A. 607

Opinion filed May 4, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action on the case for fraud and deceit brought by the plaintiff Eilert, a real estate broker, against the defendants Andrew A. Rosencrans and Roy Rosencrans, partners, because of misrepresentations made to him as a result of which he sustained a pecuniary loss. The cause was tried with a jury, resulting in a verdict in favor of the plaintiff and against the defendants for the sum of $700, remittitur of $150 and judgment for $550 on the verdict.

From the facts it appears that the plaintiff was a real estate broker, and in March, 1928, entered into an agreement with Andrew A. Rosencrans, by which Rosencrans was to convey certain property at the corner of Rosemont and Irving avenues for property at 4907-4909 Winthrop avenue, belonging to one Joseph H. Taylor. The conveyance from the Rosencrans to Taylor was contingent upon the ability of plaintiff to produce a purchaser after the deal with the cash necessary to purchase the Winthrop avenue property which would net the Rosencrans $21,000, or by procuring a mortgage on said property to the amount of $21,000 for the Rosencrans. This agreement was in writing and signed by the plaintiff and the defendants Rosencrans. An agreement was also entered into between Rosencrans and Taylor providing for the mutual transfers and conveyances of the properties, subject, however, to the agreement

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(Telegraphic) Appellants.

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(Plaintiff) Appellee.

of Eilert to produce the sum of $21,000 for the Rosencrans, as above set forth, either by securing a purchaser for the Winthrop property or by negotiating a first mortgage loan on said property which would be sufficient to pay off an existing first mortgage of $14,000 and leave a balance over of $21,000 for the Rosencrans. Eilert procured from the Heitman Trust Company an agreement to the effect that they would make the loan of $35,000 on the Taylor property, thus enabling the Rosencrans to obtain $21,000 in cash.

On the trial evidence was adduced on the part of the plaintiff showing that the defendants had stated the income derived as rentals from their property amounted to $11,400 a year. Subsequently, Taylor discovered by an examination of the leases to the building that the annual rental on said property was less than this amount and refused to go through with the deal.

The actual cost to plaintiff in procuring the $35,000 mortgage on the defendant's property was $550, for which he became obligated and ultimately paid to the Heitman Trust Company. From a reading of the testimony it appears that the plaintiff was an independent broker representing neither of the parties, but attempting to bring about a deal between them. It also appears from the evidence that Roy Rosencrans talked with Rottenbuecher, an employee of the plaintiff, and stated the amount of the rentals together with the other information concerning the property of the defendants, and that these statements were afterwards verified by Andrew Rosencrans and the amount of the rentals were then marked upon the back of the agreement between Taylor and Rosencrans.

Plaintiff testified that later at a meeting at the office of defendants' attorney, Andrew Rosencrans asked him where he got the rentals (referring to those marked on the back of the agreement) and that the plaintiff stated that they were given to Mr. Rottenbuecher by Roy Rosencrans and thereupon the defendant Andrew

of $12,000 to procure the use of $41,000 for the succession, as above set forth, either by granting a purchaser for the history property or by borrowing a first mortgage loan on said property which would be sufficient to pay off an existing first mortgage of $14,000 and leave a balance over of $21,000 for the succession. Client procured from the Citizens Trust Company an agreement to the effect that they would make the loan-at 6% on the Taylor property, thus enabling the executrix to obtain $21,000 in cash.

On the trial evidence was adduced on the part of the plaintiff showing that the defendants had stated the income derived on rentals from their property amounted to $17,100 a year. Subsequently, Taylor discovered by an examination of the leases to the building that the amount stated on said property was less than this amount and refused to be charged with the debt.

The natural cost to plaintiff in procuring the $28,000 mortgage on the defendant's property was $280, for which he became obligated and rightfully paid to the Mutual Trust Company. From a reading of the testimony it appears that the plaintiff was an independent broker representing neither of the parties, but attempting to bring about a deal between them. It also appears from the evidence that Dr. Patterson talked with Mr. Patterson, an employee of the plaintiff, and stated the amount of the rentals upon the part of the statement between Taylor and Patterson. Plaintiff testified that later at a meeting at the office of defendants' attorney, Judge Patterson called the attention of defendants' attorney to the fact the testate (referring to those noted on the back of the statement) and that the plaintiff stated that they were given to Mr. Rottenpuecher in the insurance and thereupon the defendant Taylor

Rosenorans (referring to the figures on the back of the document) stated that they were correct.

It is insisted that the contract was between Taylor, a third party, and the defendants and that the plaintiff had no interest therein and that Taylor was the one induced to enter into an agreement by misrepresentations, if any, and not the plaintiff. With this we are unable to agree. The plaintiff had a substantial interest in the contract and the entire transaction was contingent upon his ability to do certain things. Relying upon the representations as to the amount of the rentals, he was able to procure an agreement to convey the Winthrop avenue property to the defendants and by reason of the amount of the rentals was also able to obtain a $35,000 first mortgage on the premises. The representations were made directly to the plaintiff and this information was conveyed by him to Taylor. If the representations as to the amount of the rentals had been truly stated, it may well be assumed that plaintiff would have refused to enter into a contract obligating himself to do the things required of him in the contract between himself and the defendants.

The question was submitted to a jury for its consideration and the jury was fully instructed as to the things necessary for the plaintiff to prove before he was entitled to recover. Under these instructions and the pleadings plaintiff was to prove by a preponderance of the evidence that the representations were made as alleged and that he acted upon them to his injury; that they were untrue; that he suffered damage as a result and that this damage was the direct and necessary consequence of the representations made, Noll v. Peterson, 338 Ill. 552.

It is insisted on behalf of the defendants that the amount of the rentals were made upon slips of paper and afterwards

Defendants (referring to the figures on the back of the document) stated that they were correct.

It is insisted that the contract was between Taylor, a third party, and the defendants and that the plaintiff had no interest therein and that Taylor was not induced to enter into an agreement by misrepresentations, if any, and not the plaintiff. With this we are unable to agree. The plaintiff had a substantial interest in the contract and the entire transaction was contingent upon its ability to do certain things. Relying upon the representations as to the amount of the rentals, he was able to procure an agreement to convey the interest thereby acquired to the defendants and by reason of the amount of the rentals was also able to obtain a $20,000 first mortgage on the premises. The representations were made directly to the plaintiff and his information was conveyed by him to Taylor. If the representations be assumed that plaintiff would have refused to enter into a contract obligating himself to do the things required of him in the contract between himself and the defendants.

The question was submitted to a jury for its consideration and the jury was fully instructed as to the things necessary for the plaintiff to prove before he was entitled to recover. Under these instructions and the pleadings plaintiff was to prove by a preponderance of the evidence that the representations were made as alleged and that he acted upon them to his injury; that they were untrue; that he suffered damage as a result and that this damage was the direct and necessary consequence of the representations made. Hull v. Peterson, 236 Ill. 224.

It is insisted on behalf of the defendants that the amount of the rentals were made upon hire of paper and figures-

transferred to the back of the documents and that, therefore, the original notations made are the best evidence. There is no force in this argument, if, as plaintiff testified, the figures showing the rentals on the back of the contract were afterwards exhibited to the defendants and accepted by them as correct.

We see no reason for disturbing the verdict.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

transferred to the deed of the documents and that, therefore, the original petitions were the best evidence. There is no force in this argument, it is plainly untenable, the figures showing the entries on the back of the mortgage deed sufficiently explained the darkness and accepted by them as correct.

We see no reason for disturbing the verdict.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

Judgment affirmed.

35511

WILLARD MONSEN, doing business as MONSEN & MONSEN,

Appellant,

v.

JOHN GEORGE WENDELL,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

266 I.A. 607

Opinion filed May 4, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Robert R. Anderson Company, paving contractors, entered into a written agreement with the defendant, John George Wendell, under which Robert R. Anderson Company undertook to and did pave an alley abutting upon the real estate of the defendant. After the services had been performed under this agreement, the contract was assigned to the plaintiff Willard Monsen, doing business as Monsen & Monsen. Under the written agreement the work done was to cost $700 plus a carrying charge of six percent per annum. All payments not made within 10 days were to be secured by notes. In the event the property was sold, provision was to be made for the payment under this agreement by the vendee. There was to be no cancellation of the contract except by the written consent of the Robert R. Anderson Company.

Subsequently the defendant conveyed the property to one John A. Risberg and Risberg executed promissory notes covering the amount due the Anderson Company for the work done. A number of these notes were paid, but there appears to have been a default in the balance due under the contract in the amount of $223.90, which is the amount involved in this proceeding.

We are not aided in our consideration of this case with a brief on behalf of the defendant, but from the record it appears that the defense was predicated upon the proposition that by accepting the notes of Risberg, the defendant was released from his obligation under his written agreement. The cause was tried by the court without

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a jury, resulting in a finding in favor of the defendant and against the plaintiff and judgment was entered on the finding, from which judgment the plaintiff appeals.

The contract was introduced in evidence, together with a copy of the contract between Wendell and Risberg to whom the property was conveyed, but there does not appear to be any written consent to the transfer of the obligation by the Robert R. Anderson Company. Neither does it appear from the evidence that there was any oral agreement to the effect that the defendant was to be released from his written obligation.

The finding in the cause could be based only upon the fact that notes were given by Risberg and accepted by the plaintiff and that this constituted a novation or release of the defendant. The rule appears to be otherwise. The taking of a promissory note for a pre-existing debt or a contemporaneous consideration, is a conditional payment only and becomes absolute only upon payment of the note at maturity. It is true that an express agreement between the parties that the taking of such a note in full satisfaction of the existing claim, will release the original debtor, but in the absence of such an express agreement, the note is considered as collateral to the original agreement. Stone and Gravel Co. v. Gates Iron Works, 124 Ill. 623.

The evidence in the case at bar wholly failed to establish any facts which showed a relinquishment of the claim based on the original written agreement with Wendell. Upon the failure of Risberg to pay his notes as they became due, the plaintiff had a right to resort to its written agreement with Wendell in order to enforce payment as provided therein. There being no evidence in the record showing an express agreement under which the defendant was released by the taking of the notes of Risberg,

the plaintiff was injured and entered on the finding, 'and against the defendant and against the plaintiff, resulting in a finding in favor of the defendant and against the plaintiff was injured in evidence, together with the damages the plaintiff assumed."

The counsel was instructed in evidence, together with the damages the plaintiff assumed."

a coil of the contract between Kendall and Ingrid to show the contract was canceled, but there does not appear to be any written canceled was canceled, but there does not appear to be any written consent to the transfer of the obligation as duly signed". Jackson Company. Neither does it appear from the evidence that there was any oral statement to the client that the defendant was to be released from its written obligation."

The finding in the cause ought to be based only upon the fact that there was found by Hibbard and accepted by the plaintiff and that this constituted a rescission or release of the defendant. The rule applies to an agreement. The finding of a permanent cure for a non-existing fact or a mistake[illegible] consideration, is a condition[illegible] cannot only and become operative only when payment of the note is waived. It is true that an attempt [illegible] the petition that the taking of such a note in full satisfaction of the original obligation. [illegible] Under the general [illegible] 7.

[illegible] 126 Cl. 691.

the evidence in the case as put should [illegible] to [illegible] operate if such a [illegible] express [illegible], the case is considered as the original [illegible] will release the original debtor, but in the [illegible] client, will release the original debtor, but in the [illegible] the petition that the taking of such a note in full satisfaction of the note of surety. It is true that an attempt [illegible] conditional payment only and become operative only when payment of [illegible] for a non-existing fact or a mistake[illegible] consideration, is a [illegible] applied on trade which showed a [illegible] of the client [illegible] used in the case as put should [illegible] to [illegible] operate if such a [illegible] express [illegible], the case is considered as [illegible] to the original [illegible]. Under the general 7.

[illegible] 126 Cl. 691.

and the written agreement being uncontroverted, judgment should have been entered for the plaintiff, assignee of the Robert R. Anderson Company. For that reason and the reasons stated in this opinion the judgment of the Municipal Court is reversed and judgment is entered here for the plaintiff for the sum of $223.90, together with costs.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL, P.J. AND FRIEND, J. CONCUR.

and the written agreement being misunderstood, judgment should have been entered for the plaintiff, assignee of the Cadet R. Anderson Company. For that reason and the reasons stated in this opinion the judgment of the Municipal Court is reversed and judgment is entered here for the plaintiff for the sum of $288.00, together with costs.

JUDGMENT REVERSED AND JUDGMENT HERE.

HIXSON, P.J. AND PRICE, J. CONCUR.

35565

SAM KOSOVA,
Appellant,
v.
MOLLY BLOOM and PAUL BLOOM,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

266 I.A. 608

Opinion filed May 4, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with the cause of Anna Olitzky v. Molly Bloom and Paul Bloom, an appeal from the Superior Court of Cook County, and General No. 35454, in this court. In this cause, General No. 35565, a judgment by confession was obtained and afterwards opened on the petition of the defendants and upon submission to the court resulted in a finding in favor of the defendants and judgment on the finding.

For the reasons stated in the opinion in the case of Anna Olitzky v. Molly Bloom and Paul Bloom, General No. 35454, in this court, the judgment in this cause is reversed and the cause remanded to the Municipal Court with directions to expunge the judgment entered on the hearing in said cause and to order the original judgment by confession to stand as in full force and effect.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND FRIEND, J. CONCUR.

Opinion filed May 4, 1933

266 I.A. 608

35914

JOHN SCHWEDA,

(Complainant) Appellee,

v.

JACOB SLATKIN, et al,

Defendants.

On Appeal of DIVISION STATE BANK, as Trustee, BARNET KAPPEL and ROSE KAPPEL,

(Defendants) Appellants.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

266 I.A. 608

Opinion filed May 4, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal to reverse an order of the Superior Court appointing a receiver on the sworn bill of complaint, sworn amendment thereto and a verified petition in support of the motion for a receiver. The bill, amendment and petition contain facts upon which the chancellor could properly predicate the appointment of a receiver if the facts were true. No evidence having been heard and no affidavits having been filed, the appointment was based solely upon the pleadings enumerated. It is called to the attention of the court, however, that the verification as to the bill, amendment to the bill, and the petition are insufficient. The verification to the bill is signed, "John Schweda, by William Schiepan, his solicitor". This verification was bad. Moreover, it is bad in another respect as are the verifications to the petition and the amendments to the bill. The affiant to each of these separate pleadings states: "That he has read the above bill (petition or amendment to the bill); knows the contents thereof, and that the matters therein set forth are true in substance and in fact, except as to those matters stated upon information and belief, and as to those, he believes them to be true." This verification has been repeatedly held bad. The rule has been well announced in the case of

Opinion filed May 4, 1933

Roman v. Humphreys, 220 Ill. App. 503, in which the court in its opinion, says:

> "Two different verifications on this subject have been discussed by courts of review in Illinois. One of them states that the contents of the affidavit are true, 'except as to those matters therein stated to be on information and belief, and as to those matters he verily believes the same to be true.' The other states the exception thus; 'except as to those matters therein stated on information and belief and as to those matters he verily believes the same to be true.' We held in Stephenson v. Porter, 191 Ill. App. 303, that the form first above stated refers the court to the language of the bill itself to ascertain what is 'therein stated to be on information and belief,' while the other form requires a search into the mind of the pleader or of the affiant to learn what he intended to state on information and belief. The cases generally hold the first form positive and sufficient and the second form uncertain and insufficient."

As was stated by the court in Stirlen v. Neustadt, 50 Ill. App. 378, those matters in the bill of complaint which may be therein stated on information and belief can only be known by probing the pleader's mind, but matters in the bill that are therein stated "to be" on information and belief may be ascertained by examining the bill. The same rule of construction applies with equal force to the amendment of the bill and the petition filed in support of the motion.

From the verifications involved in this proceeding, it can not be ascertained from the pleadings as to what the matters stated on information and belief consisted. It may have been all the facts set forth in the pleadings. If the matter had been called to the attention of the chancellor, we have no doubt but what it would have been corrected, but the defendant has been granted the right of an interlocutory appeal by statute and can properly raise the question here. It has been called to our attention by defendants in their brief, and their assignments of error, are sufficient to rasie the question. It is undoubtedly true that considerable hardship will arise as a

Norman v. Murphy, 580 III. App. 3d 1, 6, 36 Ill. Dec. 203, 206, 419 N.E.2d 1, 4 (1981), in which the court in its opinion, says:

> "Two different ventilations on this subject have been discussed by courts of review in Illinois. One of them states that the contents of the affidavit are true, 'except as to those matters therein stated to be on information and belief,' and as to those matters he verily believes the same to be true.' The other states the exception thus; 'except as to those matters therein stated on information and belief and as to those matters he verily believes the same to be true.' In Bell v. Pittsburgh v. Cutter, 101 Ill. App. 302, that the form first above stated reflects the correct to the language of the Act. It went on to say that it is 'therein stated to be on information and belief,' while the other form requires a person into the mind of the signer or of the affiant to learn what he intended to state on information and belief. The cases generally hold the first form sufficient and the second form insufficient.'

As was stated by the court in Cutter v. Bennett, 80 Ill. App. 278, those matters in the bill of complaint which may be therein stated on information and belief, one may be known by reading the pleader's oath, but matters in the bill that are therein stated "to be" on information and belief may be ascertained by examining the bill. The only rule of construction applies with equal force to the amendment of the bill and the petition filed in support of the motion.

[illegible] the particulars involved in this proceeding, it can not be ascertained from the pleadings as to what the matters stated on information and belief consisted. It may have been all the facts set forth in the pleading. If the matter had been outlined to the examiner, as was the intention of the ordinance, it would have been material, but the petitioner [illegible] to do our attention of defendants in their stead, and their counsel must strictly notice the question here. It has been called [illegible] the right of an investigatory agency by statute has been exercised by courts of review in Illinois.

result of disturbing the present receivership, but there being no pleadings properly sworn to upon which the receivership could be created, we are compelled to reverse the order appointing a receiver. For the reasons expressed in this opinion, the order is reversed.

ORDER APPOINTING A RECEIVER REVERSED.

REBEL, P.J. AND FRIEND, J. CONCUR.

result of disturbing the present restrictions, but there seems no
pressing necessity exists to open wider the restrictions until
be created, as the accounts of Europe the stock exhausting a
receiver. Nor the reasons advanced to its opinion, its order
is received.

KEMP, J.T. The writer, A. Doctor.

38732

CHARLES HULSMAN,
Appellee,

vs.

R. G. FISCHER & CO., INC.,
and A. H. JOHNSON,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

89 17

266 I.A. 608[3]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover compensation for personal injuries, had a verdict and judgment against both defendants for $15,000. They appeal.

Plaintiff was struck by an automobile owned and operated by defendant Johnson and both defendants argue that plaintiff was guilty of contributory negligence as a matter of law.

The accident happened in the afternoon of December 6, 1929, near the intersection of Milwaukee avenue which runs diagonally toward the northwest, and Western avenue which runs north and south, in Chicago. Plaintiff, then about seventy-three years of age, after having had luncheon in a restaurant on the east side of Western avenue, started to cross to the northwest corner of Western and Milwaukee. The place where he started to cross was directly opposite the northwest corner, but because of the diagonal slant in Milwaukee avenue was some distance north of the northeast corner of the two streets. Some repairs were in process in the street on Western avenue; the car tracks were torn up and piles of dirt were along the curb on the east side of Western avenue which prevented people from stepping into the street except at the point where the plaintiff started across. Defendant Johnson had parked his car approximately three or four feet north of this temporary cross-walk while he and a companion, Roy Johnson, not related, had their luncheon nearby. Afterward they got into the car just about the time the plaintiff started across the street and, without giving any warning or signal, backed the car into plaintiff, throwing him to the street and in-

38756

CHARLES MCKENNA,

Appellee,

vs.

S. FISHER & CO., INC.,

and A. H. JENKINS,

Appellants.

256 I.A. 608

MR. JUSTICE MOSCOWITZ DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover compensation for personal injuries, had a verdict and judgment against both defendants for $15,000. They appeal.

Plaintiff was struck by an automobile owned and operated by defendant Jenkins and both defendants argue that plaintiff was guilty of contributory negligence as a matter of law.

The accident happened in the afternoon of December 5, 1924, near the intersection of Ellsworth avenue (which runs diagonally toward the northwest, and Fulton avenue which runs north and south, in Chicago. Plaintiff, then about seventy-three years of age, after having had luncheon in a restaurant on the east side of Fulton avenue, started to cross in the northwest corner of Fulton and Ellsworth. The view there is stated to cross was directly across the northwest corner, but because of the elevated steps in Ellsworth avenue was some distance north of the northwest corner of the two streets. There trains were in process in the street on Fulton avenue; the car tracks were icy and piles of dirt were along the curb on the east side of Fulton avenue which prevented people from stepping into the street except at the point where the plaintiff started across. Defendant Jenkins had parked his car approximately three or four feet north of this temporary cross-walk while he and a companion, Ray Johnson, had visited, and their luncheon nearby. Alternated step out into the car just about the time the plaintiff reached before the street and, without giving any warning or signal, backed the car into Plaintiff, thereby him to the street and in-

flicting serious injuries. A police officer who was directing traffic at this intersection testified that no warning or signal of any kind was given from the car before it started up. The officer saw the car backing up and "hollered" to the driver, but it continued backing until it struck the plaintiff; the officer also testified that the plaintiff was about three feet from the curbstone when the car started backing and that it was too close to plaintiff to allow him to get out of the way.

Contributory negligence of plaintiff becomes a question of law only when all reasonable minds, upon consideration of the evidence, would reach the conclusion that plaintiff was injured as a result, in whole or in part, of his own negligence. Under the facts presented in this record this question was properly left to the jury.

The facts are very much like those presented in Grant v. Ward Baking Co., 217 Ill. App. 655, where a truck which had been standing still started suddenly and without warning, striking the plaintiff, who was in the act of crossing the street. It was there held that the question of contributory negligence was properly left to the jury.

We are of the opinion, however, that there must be another trial for the reason that the verdict finding defendant H. G. Fischer & Company guilty is manifestly against the weight of the evidence. This defendant filed a plea of non-ownership and operation of the automobile, and it is not disputed that it did not belong to the defendant Fischer & Company but did belong to defendant Johnson at the time and was operated by him. Therefore, the only theory upon which a verdict of guilty might be had against Fischer & Company is that the relation of master and servant existed between it and Johnson. If Johnson at the time of the accident was acting within the scope of his employment by

of the accident was sought within the realm of pre-existing ca
casual factor's presence it was ignored. It appears at this time
Corporal Fletcher's removal it was the opinion of several mem
the only threat that might create a reversal of duties in that
Lieutenant Johnson at this time had been operated by him. Therefore,
belong in the lieutenant Fletcher's command but its point in de-
tion of the automobile, and it is not disputed that it did not
avidence. This deficiency alone is sufficient to non-establish any objec-
Pleader's Counsel further is manifestly against the weight of the
trial for the reason that the verdict finding defendant . .
to the jury.

To ara of the opinion, however, that there exist sufficient fact
that the question of contributory negligence was properly left
plaintiff," who was in the act of removing the wheel. It was there
plaintiff started suddenly and without warning, striking the
Ward Testing Co., 317 Ill. App. 327, where a young waiter was kno
the jury.

The facts are very much like those presented in Ward T.

Lacks presented in this record this question was properly left to
remedy, in whole or in part, of its own negligence. Under the
sense, would reach the conclusion that plaintiff was injured by a
law only when all reasonable minds, upon consideration of the evi-
plaintiff to view him in fact and at law so.

Contributory negligence at plaintiff becomes a question of
statute at this juncture which does not bar relief if the negli-
existed which the plaintiff could not escape. The mere fact that
ployee when the car started backing and that it was his place to
plaintiff's knowledge of such peril was not sufficient to charge
of any kind was given upon the theory that he should not be
ployee was under the car before it started up. The ac-
ilar with the operation of such machine as a matter of law.
tiff was the one backing up and "assisted" in the driver, but it
connected backing until it struck the plaintiff; the alleged fine

Fischer & Company, it may be held liable for the resulting damages caused by Jonnson's negligence. If Johnson at the time was acting outside of the scope of his employment, then Fischer & Company cannot be held liable for his negligence. Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387.

Fischer & Company are engaged in manufacturing and selling appliances designed for use by physicians in applying rays of heat through electric currents to persons suffering from disease. Johnson had a contract with this company to sell its machines upon a commission basis. The contract is quite lengthy but is in substance a salesmen's contract whereby Johnson was given the right to sell in certain designated territory, with certain provisions controlling sales in other territory. There was a provision that salesmen should be allowed to take from customers "used equipment in trade for other equipment." There were provisions with reference as to how such used equipment should be handled and how credits for same should be made. Johnson agreed to work exclusively for the company and agreed not to solicit any trade or business from any customer of the company. The contract contains no provision as to how much time he should devote to the company's business and there were no provisions requiring him to report to the company except with reference to sales. Johnson testified that the car was his own and there was testimony by the vice-president of Fischer & Company that Johnson was not required to have a car; that whether or not salesmen have one is entirely up to them; that Johnson did not have authority to bargain for or buy used equipment, but only to take used equipment in trade for new equipment. This was in accordance with the terms of the contract.

Defendant Johnson testified that on the day in question he had gone to Naperville to see a Mrs. Goldspohn, the widow of a Doctor Goldspohn, who had at one time purchased a machine from Fischer &

Company; that he made an agreement with Mrs. Goldspohn to take the used machine, not in trade, and attempt to sell it for her, giving her about $75, and all over this amount he was to keep as his commission; that he had not attempted to make any sales that day for Fischer & Company but was engaged in this private undertaking to sell Mrs. Goldspohn's equipment; that he took this equipment into his car and had no other in the car, and that it was his intention to attempt to find a customer for the equipment; that this was not business of the Fischer Company but was his own; and the witness testified that under his contract he was not permitted to buy or sell used equipment but only to take it in trade. His version is supported by the testimony of his companion, Roy Johnson. No witness gave any testimony tending to contradict this story.

If defendant Johnson was engaged in a private transaction for his own benefit exclusively not under his contract with Fischer & Company and in fact forbidden by its terms, he was not at the time of the accident acting within the scope of his employment.

Plaintiff's counsel argues that the jury was not obliged to believe Johnson's story and from various circumstances might reasonably have concluded that this used equipment in Johnson's car at the time was equipment taken in trade on behalf of Fischer & Company and owned by it. The assumptions on which this argument is based do not impress us as having sufficient weight to overcome the testimony of both the Johnsons. The jury was not justified in refusing to accept their story because of the possibility of the existence of facts which might tend to disprove it. There is some question as to whose duty it was to produce Mrs. Goldspohn, who was not a witness, in order to verify or discredit Johnson's testimony. Upon the next trial she should be produced to give her version.

Complaint is made by defendant Fischer & Company of the

refusal of the court to give a certain instruction or instructions tendered on its behalf, but the abstract fails to show what these instructions were. The instruction which the brief asserts was refused we think was improper, as it told the jury that even if Fischer & Company would be directly or indirectly benefitted by the sale of the Goldspohn machine, yet they should find the company not guilty if they believed that Johnson was not the employee of Fischer & Company at the time of the accident. If the machine was to be sold for the benefit of Fischer & Company, Johnson was acting for it at the time.

We do not agree with the contention of counsel for Fischer & Company that it was entitled to an instructed verdict finding it not guilty. A jury is not required to believe a witness although there may be no direct contradiction of his testimony. Kavale v. Morton Salt Co., 329 Ill. 445; Podolski v. Stone, 186 Ill. 540.

As we have indicated, Mrs. Goldspohn should testify upon the next trial, as what she would say would go far toward determining the question of whether or not Fischer & Company can be held liable.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

request of the court to give a certain instruction or instructions tendered on its behalf, but the objection finds no room when these instructions were. The instruction which the trial court's was refused as this was improper, as it told the jury that even if Fischer & Company would be directly or indirectly benefitted by the sale of the Goldspun machine, yet they should find the company not guilty if they believed that Downie was not employed at for the benefit of Fischer & Company, Johnson was acting to be said for the benefit of Fischer & Company at the time of the accident. If the machine was for it at the time.

We do not agree with the contention of counsel for Fischer & Company that it was entitled to an instructed verdict finding it not guilty. A jury is not required to believe a witness although there may be no direct contradiction of his testimony. Temple v. Burton Belt Co., 85 Ill. App. 646; Peterson v. Lipps, 198 Ill. 96.

As we have indicated, there is sufficient evidence upon the first trial, as what the would only be for issues determining the question of whether or not Fischer & Company can be held liable.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Babcock, J., concur.

35679

CHARLES H. ESSIG,
Plaintiff in Error,

vs.

W. D. BOYCE COMPANY,
a Corporation,
Defendant in Error.

WRIT OF ERROR TO CIRCUIT COURT OF COOK COUNTY.

266 I.A. 608

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment for defendant entered upon the verdict of a jury as directed by the court at the close of plaintiff's evidence. The suit was in assumpsit upon promises averred to have been made by defendant in connection with a prize of $2500 offered by defendant as a part of a plan to increase the circulation of the Blade and Ledger, a newspaper published by it. The prize was to be awarded to the person who having complied with other conditions should submit the largest and most nearly correct list of words made of the letters of the phrase, "Win a Fortune." Plaintiff claims in his declaration that he fulfilled preliminary conditions, complied with all the rules of the contest and submitted lists as required; that on or about September 1, 1926, the winners of the prizes were announced; that the first prize of $2500 was awarded to one Loela L. Markus of Virginia, Minnesota, who submitted a list of 601 words which contained only three incorrect words, leaving 598 as the maximum number of correct words submitted by her; that plaintiff submitted three lists; that the largest list contained 68 more correct words than the list on which the prize was awarded; that plaintiff's second list contained 47 more correct words than the winning list and his third 27 more correct words; that he had thus submitted three lists which more nearly than the list to which the prize was awarded contained all the correct words. Plaintiff avers

350/39

Plaintiff in Error,	
vs.	
W. B. ACME COMPANY, a Corporation, Defendant in Error.	

Error to the Circuit Court of Cook County.

2661.4. 608

MR. JUSTICE MACKAY delivered the opinion of the court.

This is an appeal by plaintiff from a judgment for defendant entered upon the verdict of a jury as directed by the court at the close of plaintiff's evidence. The suit was to recover a prize of $500 offered by defendant as a part of a plan to increase the circulation of the Blade and Ledger, a newspaper published by it. The prize was to be awarded to the person who having completed with others contributions should submit the largest and most nearly correct list of words made of the letters of the words "Ace a Portune." Plaintiff claims in his declaration that he fulfilled certain conditions, complied with all the rules of the contest and submitted lists as required; that on or about September 1, 1908, the winners of the prizes were announced; that the first prize of $500 was awarded to one Marcus of Virginia, Minnesota, who submitted a list of 301 words; that the second prize of $250 was awarded to one Pierre of Marion County, Indiana, having 294 as the maximum number of correct words submitted by her; that plaintiff submitted three lists; that the largest list contained 65 correct words; that the list on which the prize was awarded; that plaintiff's second list contained 47 more correct words; that he had three lists and his third 27 more correct words; that the second list contained three lists each of which contained more correct words than the largest list submitted by plaintiff; that the defendant refused to award the prize to plaintiff, although plaintiff's list contained more correct words than the list to which the prize was awarded; that plaintiff was entitled to the prize; that defendant refused to award the prize to plaintiff; that

that the judges of the contest did not personally examine, grade, mark or check these three lists of words or any of the other lists; that the judges did not take part individually or collectively in determining the winners of the contest or perform any of the duties they were to perform according to the rules; that they in fact made no decision whatever; that whatever decision was made was by the defendant company itself and not by the judges named. Plaintiff's declaration avers further that the decision as rendered was ex parte, void and of no force and effect; that by reason of these things he has earned and is entitled to the reward of $2500 together with legal interest on it from September 1, 1926, but that payment has been refused.

Defendant filed a plea of the general issue. The cause was tried by a jury with the result as heretofore stated.

While the brief of plaintiff submits for our consideration fifteen propositions, in support of which some two hundred authorities are cited, there is only one controlling question in the case, namely, whether the court erred in directing a verdict for defendant. The rule to be applied in such cases is well settled in this state. If there is any evidence from which, with all just inferences, considered in the light most favorable to plaintiff, the jury could reasonably find in favor of plaintiff, a peremptory instruction should be refused. Libby, McNeill & Libby v. Cook, 222 Ill. 206; Frazer v. Howe, 106 Ill. 563; L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 72; Malloy v. Chicago Rapid Transit Co., 335 Ill. 165; Miles v. Long, 342 Ill. 589; Piersol v. Massachusetts Life Ins. Co., 260 Ill. App. 586; Provenzano v. Illinois Central R. R. Co., 263 Ill. App. 530, are only a few of the many cases which might be cited to this point.

To support the allegation of the declaration plaintiff called as his own witness Austin J. Lindstrom, one of the judges, who in

that the Judges of the contest did not personally examine, study, nor check these three large files of cards or any of the other items; that the Judges did not take part individually or collectively in determining the winners of the contest or prizes; and that the duties they were to perform according to the rules; that they in fact made no decision whatever; that whatever decision was made was by the Lanham company itself and not by the judges named. Plaintiff's declaration avers further that the decision so rendered was of course, void and of no force and effect; that by reason of these things he has failed and is entitled to the reward of $5000 together with legal interest on it from December 1, 1938, but that payment has been refused.

Defendant filed a plea of the general issue. The cause was tried by a jury with the result as heretofore stated.

While the trial of plaintiff's suit for consideration fifteen years, in support of which were two hundred witnesses ties are cited, there is only one controlling question in the case, namely, whether the court erred in directing a verdict for defendant. The rule to be applied in such cases is well recited in this opinion. If there is any evidence that would, when all just inferences, considered in the light most favorable to plaintiff, the jury would reasonably find in favor of plaintiff, a peremptory instruction should be refused. Allen, Receiver v. Lisby v. Comp., 222 Ill. 606; Fraser v. Howe, 106 Ill. 563; 1 C. J. S. p. 80, ¶ 90. V. Diamond, 192 Ill. 72; Mellor v. Chicago Herald Examiner Co., 328 Ill. 168; Kilpo v. Lane, 341 Ill. 338; Pierpont v. Mutual Life Ins. Co., 320 Ill. App. 104; Ingersoll v. Illinois Central R. R. Co., 302 Ill. 496, are only a few of the many cases that might be cited in this point.

In support the allegation of the declaration plaintiff relied on his own witness Austin J. Hardgrave, one of the judges, who in

reply to questions with reference to the manner in which the contest was judged by him, stated that the lists were all submitted to Prof. Heidbrink, one of the judges, who prepared the master list and checked all the lists against it; that at the conclusion of that work the judges were all called in and the result of the work was gone over very carefully and a decision arrived at. The witness stated that he did not know whether the Essig lists were examined against the master list or whether he examined any of the words of those lists; that he met in consultation with the other judges about the lists only once and did so at the conclusion of the contest after the lists had been marked or examined by Prof. Heidbrink; that he was employed as judge by the defendant company at the request of Mr. Reynolds, its vice-president. On cross-examination the witness stated that he did not know how many lists were entered in the contest, was not a college professor or a school teacher and had no special training in this work or in the use of the dictionary, but that one day he met with Mr. West and Professor Heidbrink to check over the work and met Professor Heidbrink that day for the first time; that he knew him to be a professor of English at Northwestern University and consented that the technical work of checking the lists be entrusted to him; that he never intended to check over several thousand lists of words. He said that he, together with Mr. West and Prof. Heidbrink, signed the documents known as the awards in the contest; that they all signed together in each other's presence, went over the lists, satisfied themselves that the awards were right and made the decision, and that they awarded the first prize to Leola L. Markus of Virginia, Minnesota, and the 26th prize to Charles H. Essig. He testified that he knew that Professor Heidbrink had submitted some problems in the contest to R. S. Crane, professor of English, University of Chicago, and to Father Fernin of Loyola University, department of English, and that having had

of Loyola University, Department of English, and that having had
professor of English, University of Chicago, and to Father Perrin
Quarfoot B. Perry. He testified that he knew that Professor Heid-
to Isola D. Curtis of Virginia, Minnesota, and the Booth prize to
right and wife was "notable". But then they awarded the first prize
once, went over the lists, partially themselves that the awards were
in the contest; that they all signed together in each other's pres-
Ware and Perry. Heidbrink, pleased the documents known as the awards
several thousand lists at stake. He said that he, together with Mr.
the time be entrusted to him; that he never intended to cheat over
Western University and completed that the completed work of counting
first time; that he came into to be a professor of English at North-
check over the work and met Professor Heidbrink that day for the
but that was day he met with Mr. Perry and Professor Heidbrink to
no special training in this work or in the case of the dictionary,
stated that he did not know how many lists were entered in the
contest, was not a college professor or a school teacher and was
employed as judge by the defendant company at the request of Mr.
Reynolds, its vice-president. On cross-examination the witness
lists had been entered or examined by Prof. Heidbrink; that he was
only once and did so at the completion of the contest after the
that he met in consultation with the other judges about the lists;
master list or whether he examined any of the packs of known lists;
he did not know whether the yearly lists were examined against the
very carefully and a decision arrived at. The witness stated that
judges were all called in and the result of the work was done over
all the lists against it; that at the conclusion of that work the
Heidbrink, one of the judges, who prepared the master list and checked
was judged by him, stated that the lists were all submitted to Prof.
really to question with reference to the manner in which the contest

the benefit of their advice the judges made their own decision. He stated that he made no individual examination of the Markus list and that it was a physical impossibility for him to have examined all the lists at the time he met with defendant.

Ivan C. West, also called as a witness for plaintiff, testified that he and two other persons acted as the judges; that they looked over the lists and the system of arriving at the winners of the contest; that those were all the duties they performed; that he knew that there was a master list but did not help prepare it; that he looked over the winner's list and some of the high standing ones but did not look over all of the smaller lists; that he could not state that he examined all the words in every one of the three lists submitted by plaintiff; that he did not compare the words in plaintiff's lists with the dictionary, nor did he know whether his colleagues examined the words in the Masig lists with the dictionary; that the judges were not in session in their final examination more than three or four hours, during which time it was physically impossible for them to examine all the lists submitted. The cross-examination disclosed that he was the president of the Liberty Securities Co. of Chicago; that he had no particular training in the use of the dictionary or of the English language; that he would not have undertaken to examine five thousand lists of words for any consideration and would not have undertaken to do a thorough and workmanlike job if he had; that he met Professor Heidbrink for the first time on the final day; that he knew him as one of the judges but expected him to do the work of the "actual English of the situation;" that he, the witness, consented to act as a judge in order to lend his name, prestige and services and to see that an honest determination was made and the rules followed. He stated, "I signed the award along with the other two judges on the day we met and after we had considered the various lists submitted and the method of making the

the benefit of their advice the judges made their own decision. He stated that he made no individual examination of the various lists and that it was a physical impossibility for him to have examined all the lists at the time he met with defendants.

Ivan C. West, also called as a witness for plaintiff, testified that he and two other persons acted as the judges; that they looked over the lists and the system of striking at the winners of the contest; that there were all the duties duly performed; that he knew that there was a master list that did not help anymore it; that he looked over the winner's list and some of the high standing ones but did not look over all of the secular lists; that he could not state that he examined all the words in every one of the three lists submitted by plaintiff; that he did not compare the words in plaintiff's lists with the dictionary, nor did he know whether his colleagues examined the words in the fresh lists with the dictionary; that the judges were not in session in their final examination more than three or four hours, during which time it was physically impossible for them to examine all the lists submitted. The cross-examination disclosed that he was the president of the rifle club organized in Chicago; that he had no particular training in the use of the dictionary or of the English language; that he would not have undertaken to examine five thousand lists of words for any consideration and would not have undertaken to do a thorough and responsible job if he had; that he was not prepared tonight for the first time on the final day; that he knew all of the judges but expected his to do the work of the "actual English of the elimination;" that he, the witness, consented to act as a judge in order to lend his name, prestige and services and to see that an honest determination was made and the rules followed. He stated, "I signed the award along with the other two judges on the day to act and after we had considered the various lists submitted and the method of making the

award." Mr corroborated the testimony of Mr. Lindstrom with reference to Professor Crane of the University of Chicago and to Father Pernin of Loyola University and said their advice had been submitted to the judges and adopted by the judges. He said he did not go through the manual labor of checking lists word for word against the master list, because they had already been doubly checked by stenographers in the office of defendant. He testified that he was willing to appear to the public as a judge in the contest; that the system of judging used was that of finding the percentage of completeness by dividing the number of correct words by the number of words in the master list and the percentage of correctness by dividing the number of correct words by the number of words in the list, then adding the two totals and dividing by two, which would give the standing of the lists; that the master list was the one by which the other lists were judged.

This master list appears in the evidence as plaintiff's exhibit "H". Mr. West was shown this list and asked why the words "into" and "IOU" were allowed. He replied, "I accepted this list as the master list without questioning the words. As a matter of fact I did not compare either words with the dictionary." He further testified that on the committee of judges there was a professor of English who had the advice of other professors of English, and that they brought this list and said, "This is the master list that we think is right," and he took their judgment.

Plaintiff was sworn as a witness and stated that he had entered over 25 contests in addition to this one and won two first prizes - one in the Mother's Home Life word-building contest - a second prize and several minor prizes; that in all these contests he had to consult the New International Dictionary.

Mr. Reynolds testifying for plaintiff said that most of the checking of the lists against the master list was done by a

award." Dr Morpheotsad the testimony of Mr. Lindstrom with refer-
ence to Professor Crane of the University of Chicago and to Indiana
Farmin of Loyola University and said their advice had been solicited
to the judges and adopted by the judges. He said he did not go
through the manual labor of counting lists word for word against the
master list, because they had already been doubly checked by
stenographers in the office of defendant. He testified that he was
willing to appear in the public as a judge in the contest; that the
system of judging used was that of finding the percentage of mis-
placement by dividing the number of correct words by the number of
words in the master list and the percentage of correctness by
dividing the number of correct words by the number of words in the
list. Then adding the two totals and dividing by two, which would
give the standing of the lists; that the master list was the one by
which the other lists were judged.

This master list appears in the evidence as plaintiff's
exhibit "K". Dr. Peet was shown this list and asked why the words
"into" and "IOU" were allowed. He replied, "I accepted this list
as the master list without questioning the words. As a matter of
fact I did not compare either words with the dictionary." He fur-
ther testified that on the occasion of judges there was a proclamat
of Emily who had the advice of other professors at Loyola, and
that they brought this list and said, "This is the master list that
we think is right," and so took their judgments.

Plaintiff was shown as a witness and asked that he had en-
tered over 25 contests in addition to this one and was the first
prize - was it the matter's case like word-building contest - a
second prize and several minor prizes; that in all these contests
he had to consult the two international dictionary.

Dr. Daniels testifying for plaintiff said that most of
the objects of the lists against the master list was that by a

Mr. Statmen and his assistants, the clerks in the office; that Professor Heidbrink checked the larger ones; that the master list was prepared by Professor Heidbrink and the other two judges had nothing to do with the preparation of that master list and the work on it; that the figures showing the results attached to other exhibits were put on the lists by Mr. Statmen after the checking of them had been done in the office.

This seems to be the substance of the evidence offered in plaintiff's behalf.

The rules of law applicable to suits of controversy of this character are not different from those which ordinarily obtain where the courts are called upon to decide questions arising out of alleged violations of promises contained in other contracts. It seems to be conceded by the parties that it is the law that a person who offers a prize or reward may offer it upon such conditions as he sees fit to impose. No one is under any obligation to accept the offer as made. Anyone to whom it is offered may accept it. Anyone may reject it for any reason. When, however, a contestant has accepted an offer as made and undertakes to comply therewith, the minds of the parties having met and the offer of the one being the consideration for the acceptance of the other, a valid contract comes into existence and the parties become vested with legal rights under the contract. Any failure by one of the parties to perform his obligations under the contract makes the defaulting party liable in an action for damages. These are general rules about which there is no controversy, and the authorities so hold. 54 C. J. 774; 23 R. C. L. 1115. Plaintiff entered this contest, which was carried on according to eleven written rules, and undertook to compete with others for the award or prize which was to be given, under these rules, to that person who would submit "the largest and most nearly correct

Mr. Stetson and his associates, the clerks in the office; that Profe-
ssor Heidbrink checked the larger ones; that the smaller ones were
prepared by Professor Heidbrink and the other two judges pro rating
to do with the preparation of that smaller list and the work on it;
that the figures showing the results entered in other exhibits
were put on the lists by Mr. Stetson after the checking of them
had been done in the office.

This seems to be the substance of the evidence offered in
plaintiff's behalf.

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offers a prize or reward may offer it upon such conditions as he
sees fit to impose. He can in order my obligation to accept the
offer as made. Anyone to whom it is offered may accept it. Anyone
may reject it for any reason. Then, however, a contestant has ac-
cepted an offer as made and undertaken to supply interests, the
rights of the parties having met and the offer of the one being the
consideration for the acceptance of the other, a valid contract
comes into existence and the parties become vested with legal rights
under the contract. Any failure by one of the parties to perform
his obligations under the contract makes the defaulting party liable
in an action for damages. These are general rules about which there
is no controversy, and the authorities so hold. 84 N. J. 174; 53
N. C. L. 1119. Plaintiff entered into contest, which was governed
according to eleven written rules, and undertook to compete with
others for the award or prize which was to be given under these rules,
to that person who should submit "the largest and most nearly correct

list of words made from any of the letters in these words - "Win a Fortune." The rules provided among other things that the contestant might not use obsolete, dialectic, compound, hyphenated or foreign words, abbreviations, contractions, reformed spellings, prefixes, suffixes, proper nouns or proper adjectives; that words of the same meaning but spelled differently would be counted as separate words; that words of the same spelling but of different meaning would be counted as one word; that Webster's 1924 New International Dictionary would be used by the judges as final authority. Rule 8 provided:

"These well-known Chicago business men have agreed to act as judges and their decision will be accepted as final -- Ivan C. West, capitalist, Austin J. Lindstrom, cashier, State Bank of Chicago, and F. W. Heidbrink, Professor of English."

The rules provided that a contestant who desired might submit more than one list of words which would be judged separately from or independently of any other list; that the lists of words should be mailed on or before post office closing time, April 26, 1926. Rule 11 expressly stated, "The conditions as set forth above are agreed to and accepted by all participants."

The undisputed evidence shows that the judges met; that they gave consideration to their duties, and that they rendered decisions and made awards. The agreement of the parties was that the judges' decision would be accepted as final. Such agreement is not unusual, is not immoral, and is not, so far as we are aware, contrary to public policy. On the contrary, some such agreement would seem to be reasonable and necessary in contests of this kind. The prize for the best horse, the best cow, the best bushel of apples, the best dozen ears of corn, or for the happiest baby, all require, in the very nature of things, the judgment of persons who are fallible and with whose judgment many would not agree, but where, as here, the parties enter into the contest knowing who the judges are to be and have expressly agreed that the judgment shall be final, the

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cases generally hold that in the absence of fraud or its equivalent the award as made is final and incontestable. In Davidson v. Times Printing Co., 63 Wash. 397, 116 Pac. 18, 34 L.R.A. 1164, the court held that the party offering the award could, if he saw fit, make himself the judge of who was entitled to receive it. In Wellington v. Monroe Trotting Park Co., 90 Me. 495, the Supreme court of that state held that if the judge of a horse race acted without fraud or mistake his decision was final and not to be reviewed by the court; and in Smith v. American Automobile Assoc., 69 Misc. (N.Y.) 60, 125 N. Y. Sup. 804, it was held the motor companies competing for what was known as the Glidden trophy could not require the question of who was the winner to be subjected to judicial review in the absence of fraud, unless the decision as made was so bare of evidence to sustain it that no honest mind could reach such a result.

Plaintiff here cites Scott v. People's Monthly Co., 209 Ia. 503, where in a somewhat similar contest the trial court found that the three judges whose decision was to be accepted as final did not in fact perform the duty which devolved upon them as judges, but that they improperly delegated that duty to an employee or employees of the defendant and merely approved the judgment of these employees, and that under such circumstances the so-called decision of the judges was not final. The trial court also found that the plaintiff did not comply with the terms and conditions of the offer as made and that there was no substantial performance by her, and that for that reason she was not entitled to recover. The Supreme court affirmed the judgment of the trial court finding for defendant upon the last ground, and it was therefore unnecessary for it to pass upon the other question, and what was said on that phase of the case was merely obiter dictum.

Holt v. Rural Weekly Co., 173 Minn. 337, is also cited by

the case was merely unfair dictum.

Scott v. Avery Tenants Co., 173 Misc. 327, is also cited by those upon the other question, and what was said on that phase of the matter was made in final and incontestable. In Davidson v. Times Printing Co., 83 Fed. 329, 116 Fed. 18, 54 C.C.A. 114, the court held that the party offering the award could, if he saw fit, make himself the judge of the law applicable to pending it. In Burlington v. Boston Elevated Ry. Co., 90 Fed. 498, the Supreme court of that state held that if the judge of a lower court acted without fraud or mistake his decision was final and not to be reviewed by the court; and in Scott v. American Automobile Assoc., 99 Misc. (N.Y.) 69, 163 N. Y. Sup. 804, it was held the motor organization conducting for whom was known as the Gillham trophy could not require the question of who was the winner is to be submitted to Justice Levine in the absence of fraud, unless the decision as made was so pure of evidence to establish it that no honest mind could reach such a result.

Plaintiff here cites Smith v. Virginia & Nevada Co., 209 Ia. 809, where in a somewhat similar situation the lower court found that the three judges whose decision was to be accepted as final did not in fact perform the duty which devolved upon them as judges, but that they improperly delegated that duty to an employee at an- pleasure of the defendant and merely approved the judgment of those employees, and that under such circumstances the so-called decision of the judges was not final. The trial court also found that plaintiff did not comply with the rules and conditions of the offer, and that there was no objection interposed by her, and that for that reason she was not entitled to recover. The Supreme court affirmed the judgment of the trial court finding any deficiency

plaintiff. In that case a newspaper offered a prize of $1,000 to "be awarded by the judges of the puzzle" to the person who would send in the largest correct list of words made up from the letters in the name of "Mary Pickford." This was the only reference to judges in the rules. The defendant appointed judges but had its own employees check over the lists, mark the incorrect words and compute the number of correct words. The judges were then called, and they took the results as stated by defendant's employees and signed the certificate awarding the prize without making any examination themselves to determine the correctness of the results. A supplemental list which had been sent in by the plaintiff was rejected because he left it for the judges to determine whether the words of those classes were to be included, and the words were rejected although similar words submitted by others were allowed because it was claimed that the plaintiff should have determined that question for himself and placed the words in his main list. There was no such requirement in the conditions submitted by the defendant, and the court held that it was wrong to exclude these lists; that it was obviously unfair and unjust to count words of a certain kind in favor of one of the contestants and to exclude the same words when submitted by the other contestants. In that case, unlike this, the rules did not either name the judges who were to decide or provide that their decision should be final. The discrimination there was equivalent to fraud.

Plaintiff cites Long v. Chronicle Pub. Co., 68 Cal. App. 171, 228 Pac. 873, and urges that the court there stated the law which should be applied to cases of this character. In that case the defendant newspaper offered as a second prize in a subscription contest an automobile alleged to be of the value of $1,995. The rules of the contest provided, among other things, that cash must accompany the orders; that the contest would be under the personal

supervision of two or more judges "from the advisory board" and that the right to amend the rules was reserved to defendant; that should any question with reference to the contest arise the decision of the management would be absolute and final, and that each of the contestants agreed to abide by all these conditions. The rule which required that cash should accompany the orders was waived by the defendant until the last week of the contest, it having up to that time accepted personal checks in lieu of cash. The contest lasted about eight weeks, and at about the beginning of the last week the defendant published a notice in its newspaper to the effect that all subscriptions deposited must be covered by cash or certified checks; that personal checks up to $10 were acceptable, provided no two checks were signed by the same party. The plaintiff during the evening of the last day of the contest deposited with the defendant two uncertified checks, one for $30 and the other for $18, to cover certain subscriptions obtained. The checks were cashed and the money received by the defendant. When the judges of the contest made an accounting for the several contestants, it was found that by giving the plaintiff credit for the subscriptions covered by the two uncertified checks she would be entitled to the second prize; that otherwise she would be entitled to the third prize, which was of the value of $500; and the judges of the contest ruled that the plaintiff was entitled only to the third prize. She brought suit and the case was tried before the court with a jury, which rendered a verdict in her favor. An amended complaint, to which the defendant demurred, was filed. The demurrer was overruled, and a motion for judgment on the pleadings was denied. It was urged upon appeal that the court erred in these rulings. The court said in substance that the allegations of the amended complaint showed that the duty of counting the votes correctly was assumed by the judges of the contest;

that it was alleged that, had the judges properly given the plaintiff credit she would have received a sufficient number of votes to entitle her to the second prize; that the answer to the amended complaint contained an affirmative defense based upon the notice printed in the defendant's newspaper, together with the alleged finality of the decision by the judges of the contest - all of which being deemed denied by the plaintiff, raised issues thereon requiring the introduction of evidence in substantiation thereof, and that under such circumstances no error was committed by the trial court in denying the defendant's motion for judgment on the pleadings. The opinion of the court further states that while no question was apparently raised regarding the power of the judges of the contest, as distinguished from the "management," to supervise the contest and to determine to whom the several prizes should be awarded, nevertheless the authority of the "management" or of the judges of the contest could not be used so as to deprive the plaintiff of her legal rights, and that assuming that the judges of the contest acted in the highest good faith with reference to their determination of the facts relative to plaintiff's rights in the premises, "they possessed no authority to decree that plaintiff should not have that to which she was legally entitled."

The opinion holds in substance, we think, no more than that where the judges act under a mistake of fact or fraudulently their decision is not final, and that rule is not contrary to the rule announced in other cases. The evidence in the instant case shows that while employees may have performed the mere manual work of checking up the lists of words, it was checked against a master list prepared by one of the judges who was a professor of English in a university. Of the three judges he was best fitted to perform that service, and the record indicates that such a master list was required by the post office department as a condition precedent

to allowing any such contest to be carried on. It is true that the lists of plaintiff contained a larger number of correct words than did the lists of the person to whom the first prize was awarded by the judges, but every one of the three lists which he submitted contained a much larger number of incorrect words than the list of the contestant to whom the prize was awarded, her list containing only three incorrect words, while plaintiff's lists contained from 44 to 70 incorrect words. There is a letter in evidence written by plaintiff which shows that he had knowledge that it was customary in contests for awards of this kind offered by defendant to penalize a party for the submission of lists containing words which were improper. There is nothing here to indicate that these judges were partial or that they were unfair or unjust. One of the qualities which the winning list was required to possess according to the rules, was that of containing the most nearly correct words. That requirement seems eminently fair, and, indeed, would seem to be absolutely necessary. Otherwise plaintiff might have filed as his list all the words in the dictionary and required the judges of the contest to eliminate the words which were not proper. A contest conducted in that way would have been unfair and ridiculous. The rule having provided that the decision of the judges should be final and the evidence of plaintiff having failed to show that there was any fraud in the granting of the award and the award having been made to another and not to plaintiff, and there being no evidence tending to show that the decision of the judges was directed or controlled by defendant, plaintiff was not entitled to recover, and the trial Judge properly directed the jury to return a verdict in favor of defendant. For these reasons the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

35770

LITTLE JONES COAL COMPANY, a Corporation,
Appellant,

vs.

EDWARD M. HOLTON,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

266 I.A. 608

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in the trial court has perfected this appeal from an order granting a motion in the nature of a writ of error coram nobis under section 89 of the Practice act. The order set aside a judgment by default in the sum of $3345 entered in favor of plaintiff and against defendant on July 13, 1931. The motion was made October 23, 1931, and was supported by a petition which plaintiff contends was insufficient. Defendant has not appeared in this court in support of the order as entered.

The record shows that the praecipe was filed March 10, 1931; that summons issued on the same day which was returned by the sheriff "defendant not found;" that on April 9, 1931, plaintiff filed a declaration consisting of five counts; that the first count was in trover and that the other counts in substance alleged that defendant was acting as the agent of plaintiff for the sale of certain coal under a written agreement that the title of the coal which had been delivered to him should remain at all times in plaintiff, and received eighteen cars of coal of the value of $5440.02; that he failed and refused to deliver back to plaintiff the unsold portion of same upon demand. The declaration also avers that under the terms of the written contract defendant was required to keep accurate account of all the coal received, sold and delivered and that plaintiff should at all times have access to defendant's books for the purpose of verification, but that defendant had wilfully and wantonly and with the intention to defraud failed to keep

Little Rock Belt Railway, a Corporation,	Appellant,
vs.	
Edward R. Norton,	Appellee.

256 I.A. 608

Appeal from Circuit Court of Pulaski County.

Plaintiff in the trial court has perfected this appeal from an order granting a motion to dismiss at a term at which cause under section 89 of the Practice Act. The order was made judgment by default in the sum of $2500 entered in favor of plaintiff and appeals perfected on May 17, 1921. The motion was made October 22, 1921, and was supported by a petition which plaintiff controverts the jurisdiction. Defendant does not contend in this court in support of the order as entered.

The record shows that on January 10, 1921, that summons issued on the same day which was returned by the Sheriff "Defendant not found." That on April 7, 1921, plaintiff filed a declaration containing 21 lines; that on first count was in trover and that the other counts in substance alleged that defendant was acting as the agent of plaintiff for the sale of certain coal under a written agreement that the title at the mouth which has been delivered to it should remain in all times to plaintiff, and recovered eighteen cars of coal of the value of $2500.00; that by virtue of failure to deliver back in quantity the coal as agreed. The declaration also stated that plaintiff should at all times have access to keep accurate account of all the coal received, and that defendant's books for the purpose of verification, but that defendant had wilfully and wantonly and with the intention to defraud failed to keep

such accounts and records.

The record further shows that defendant was duly served by the sheriffon May 29, 1931, and that he failed to enter any appearance or plead; that on July 13, 1931, an order was entered on motion of plaintiff finding that defendant had been duly served ten days before the first of the term; that having been called, etc., he came not but made default which was ordered to be taken and entered of record. The record continues:

"Thereupon reference is had to the Court to assess the plaintiff's damages herein and the Court now here after hearing all the allegations and proofs submitted herein by the plaintiff and being fully advised in the premises finds the defendant guilty and assesses the plaintiff's damages to the sum of Thirty-three Hundred and Forty-five Dollars ($3345.00) which sum includes interest from May 15, A. D. 1930, to and including July 11, A. D. 1931.

Therefore it is considered by the Court that the plaintiff do have and recover of and from the defendant Edward M. Holton, its said damages of Thirty-three Hundred and Forty-five Dollars ($3345.00) in form as aforesaid by the Court assessed together with its costs and charges in this behalf expended and have execution therefor."

The petition of defendant filed October 23, 1931, states that the motion was made under section 89 of the Practice act and recites the record which it alleges to be indefinite in that it does not state that default was entered for want of an appearance or for failure to plead, answer or demur. We hold the record discloses facts which show that defendant did not appear, although duly served and called in open court, and that the default was entered for want of such appearance.

The petition represents that fraud entered into the proceedings and avers that defendant entered into a contract with plaintiff for the purchase of coal on August 30, 1929, which provided for the delivery of coal to defendant on consignment; that defendant defaulted in payment for coal and was requested by plaintiff to execute a judgment promissory note for the amount due, conditioned that the execution of the note would cancel, satisfy and abrogate the contract in full; that when plaintiff

LITTLE TOKYO C.T.C. CORP.,
a Corporation,
Appellant,
vs.
RAYMOND K. HOKIDA,
Appellee.

256 I.A. 608

IN. JUDICIAL MATTERS RELATIVES THE CREDIT OF THE COURT.

Plaintiff in the trial court has petitioned this appeal from an order from this a motion in the nature of a writ of error coram nobis under section 80 of the Practice act. The order set aside a judgment by default in the sum of $3843 entered in favor of plaintiff and against defendant on July 14, 1931. The motion was made October 23, 1931, and was supported by a petition which plaintiff contends was insufficient. Defendant has not appeared in this court in support of the order as entered.

The record shows that the praecipe was filed March 19, 1931; that summons issued on the same day which was returned by the sheriff "defendant not found;" that on April 9, 1931, plaintiff filed a declaration containing of five counts; that the first count was in trover and that the other counts in substance alleged that defendant was acting as the agent of plaintiff for the sale of certain coal under a written agreement that the title of the coal which was been delivered to it should remain at all times in plaintiff, and received thereon cash at part of the value of $1140.00; that he failed and refused to deliver back to plaintiff the agreed portion of them upon demand. The declaration also avers that under the terms of the written contract defendant was required to keep accurate account of all the coal received, sold and delivered and that plaintiff should at all times have access to defendant's

LITTLE TOKYO C.T.C. CORP.
a Corporation
Appellant
vs.
RAYMOND K. HOKIDA
Appellee.
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

such accounts and records.

The record further shows that defendant was duly served by the sheriffon May 29, 1931, and that he failed to enter any appearance or plead; that on July 13, 1931, an order was entered on motion of plaintiff finding that defendant had been duly served ten days before the first of the term; that having been called, etc., he came not but made default which was ordered to be taken and entered of record. The record continues:

"Thereupon reference is had to the Court to assess the plaintiff's damages herein and the Court now here after hearing all the allegations and proofs submitted herein by the plaintiff and being fully advised in the premises finds the defendant guilty and assesses the plaintiff's damages to the sum of Thirty-three Hundred and Forty-five Dollars ($3345.00) which sum includes interest from May 15, A. D. 1930, to and including July 11, A. D. 1931.

Therefore it is considered by the Court that the plaintiff do have and recover of and from the defendant Edward M. Holton, its said damages of Thirty-three Hundred and Forty-five Dollars ($3345.00) in form as aforesaid by the Court assessed together with its costs and charges in this behalf expended and have execution therefor."

The petition of defendant filed October 23, 1931, states that the motion was made under section 89 of the Practice act and recites the record which it alleges to be indefinite in that it does not state that default was entered for want of an appearance or for failure to plead, answer or demur. We hold the record discloses facts which show that defendant did not appear, although duly served and called in open court, and that the default was entered for want of such appearance.

The petition represents that fraud entered into the proceedings and avers that defendant entered into a contract with plaintiff for the purchase of coal on August 30, 1929, which provided for the delivery of coal to defendant on consignment; that defendant defaulted in payment for coal and was requested by plaintiff to execute a judgment promissory note for the amount due, conditioned that the execution of the note would cancel, satisfy and abrogate the contract in full; that when plaintiff

mand documents and records.

The record further shows that default was duly entered by the Sheriff on 3rd, 1931, and that he failed to enter any appearance or plead; that on July 13, 1931, an order was entered on motion of plaintiff finding that default had been duly entered ten days before the first of the term; that having been called, the case was not but made default which was ordered to be taxed and entered of record. The record continues:

"Thereupon reference is had to the Court to assess the plaintiff's damages herein and the Court now sets after hearing all the allegations and proofs submitted herein by the plaintiff and being fully advised in the premises finds the issues for plaintiff and assesses the plaintiff's damages to the sum of Thirty-three thousand and forty-five Dollars ($33045.00) which sum included interest from May 15, A. D. 1930, to and including July 13, A. D. 1931.

Therefore it is considered by the Court that the plaintiff do have and recover of and from the defendant Edward S. Judson, the said damages of Thirty-three hundred and forty-five Dollars ($33045.00) in form as aforesaid by the Court assessed together with its costs and charges in this behalf expended and have execution therefor."

The petition of defendant filed October 23, 1931, states that the motion was made under section 20 of the Practice Act, and recites the record which it alleges to be infamitis it that it does not state that default was entered for want of an appearance or for failure to plead, answer or demur. To this the record discloses that default was entered and until in open court, and that the default was entered for want of such appearance.

The petition represents that fraud entered into the proceedings and every that defendant entered into a contract with plaintiff to purchase it coal on August 20, 1930, which provided for the delivery of coal to defendant on consignment; that defendant delivered in payment for coal and was receiving by plaintiff on account a payment previously note for the amount due, maintained that the execution of the note would cancel, entirely and discharge the contract in full; that when plaintiff

filed his declaration and defendant was served with process he believed that plaintiff was proceeding to take judgment against defendant on this promissory note; that contrary to the express understanding that the judgment note was to satisfy the contract in full, plaintiff appeared in court on July 13th and fraudulently took judgment under the declaration as filed, and that upon taking judgment, plaintiff obtained a writ and caused defendant to be incarcerated, etc.

The nature of the error which may be corrected by motion under section 89 of chapter 110 (Smith-Hurd's Ill. Rev. Stats. 1931, chap. 110, sec. 89, p. 2208) has often been considered by the Supreme court and by this court. In McCord v. Briggs, 249 Ill. App. 516, affirmed 338 Ill. 158, we said:

"We think this review of authorities discloses that errors which can be corrected by motion under section 89 are only such errors of fact as go to the capacity of the parties or misprision of the clerk of the court which do not contradict the record and which, if known to the Court, would have prevented the entry of the judgment."

To the effect that such is the general rule it is necessary only to cite without discussion People v. Noonan, 276 Ill. 430; Chapman v. North American Life Ins. Co., 292 Ill. 179; Marabia v. Thompson Hospital, 309 Ill. 147. These cases not only sustain the rule as there announced but also hold that the motion may not be used to relieve a defendant from the consequences of his own fault and negligence; that a court may not allow or deny a motion of this sort in its own discretion, but that if the motion is not within section 89 the court has no jurisdiction or power after the term to vacate the judgment sought to be set aside. Consolidated Coal Co. v. Oeltjen, 189 Ill. 85; Loew v. Krause, 320 Ill. 244. These cases are also to the effect that the writ may not be availed of under the claim of fraud merely because a plaintiff fails to introduce evidence which he might have introduced or even because false testimony was given upon the trial of the original action.

filed his declaration and default was entered with process be
believed that plaintiff was proceeding to take judgment against
defendant on this promissory note; that contrary to the express
understanding that the judgment note was to satisfy the contract
in full, plaintiff appeared in court on July 13th and fraudulently
took judgment under the declaration as filed, and that upon issuing
judgment, plaintiff obtained a writ and caused defendant to be
incarcerated, etc.

The nature of the error which may be corrected by motion
under section 69 of chapter 110 (Smith-Hurd's Ill. Rev. Stats.
1931, ch. 110, sec. 69, p. 2304) has often been considered by
the supreme court and by this court. In Mowrey v. Indiana, 249
Ill. App. 114, affirmed 339 Ill. 138, we said:

"To widen this review of substantive decisions that error
which can be corrected by motion under section 69 are only such
errors of fact as go to the regularity of the writing or misprision
of the clerk of the court which do not contradict the record and
which, if known to the court, would have prevented the entry of
the judgment."

To the effect that such is the relevant rule it is necessary
only to cite without discussion Smith v. Duncan, 276 Ill. 430;
Chesmon v. Peoria Association Site Ins. Co., 281 Ill. 178; Karpsis v.
Thompson Hospital, 309 Ill.147. These cases set only certain the rule
as there announced but also hold that the motion may not be used to
relieve a defendant from the consequences of his own fault and
negligence; that a court may not alter or vary a motion of this
sort in its own discretion, but that if the motion is not within
section 69 the court has no jurisdiction or power after the term
to vacate the judgment except in the act below. Chesmon v. Peoria
Co. v. Dolphin, 336 Ill. 69; Ivan v. Chemung, 320 Ill. 444. These
cases are also to the effect that the writ may not be availed of
under the guise of fraud merely because a plaintiff relies to
injurious evidence which he might have introduced or can because
false testimony was given upon the trial of the original action.

The remedy in such matters is by appeal or writ of error as provided by statute.

For the reasons indicated the order will be reversed and the cause remanded with directions to set aside the order from which this appeal is prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

The remedy in such matters is by appeal or writ of error as provided by statute.

For the reasons indicated the order will be reversed and the cause remanded with directions to set aside the order from which this appeal is prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Moorehead, J., concur.

35782

JOSEPH C. WIEDMEYER,
Appellee,

vs.

WILLIAM BRANTMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

266 I.A. 609

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This record discloses a tale of two foxes. Plaintiff brought suit in assumpsit filing the consolidated common counts with affidavit of claim. To this defendant filed a plea of the general issue with an affidavit of merits attached. There was a trial by the court and a finding in favor of plaintiff with judgment thereon for $745, to reverse which defendant has perfected this appeal.

There is practically no dispute as to the facts, which for the most part are established by written documents. Plaintiff is a painting and decorating contractor. Prior to the transaction which resulted in this suit, he had some dealings with the Lea Silver Fox Ranches, Inc., which became bankrupt and which transferred his note held by it to defendant, Brantman. Through a party representing himself to be the agent of defendant, negotiations were opened between plaintiff and defendant for the sale by defendant to plaintiff of two foxes. Plaintiff, after inspecting certain foxes in Pen No. 25 at the Glenview ranch, entered into a contract to buy two of them. This was on October 13, 1927, when plaintiff gave a check to the order of defendant as payee for the sum of $250 and received from defendant a receipt as follows:

"Received of J. C. Wiedmeyer ($250.00) Two Hundred Fifty and 00/100 to apply on a/c of the purchase of one (1) pair of Lea Fox Ltd.--located in pen #25 at the ranch of L. W. Schnitzer at Glenview, Ill., all tattoo mark and other marks of identification to be so stated in writing.

When the balance of $497.00 has been paid to me (Wm. M. Brantman) I agree to furnish and transfer title to said foxes and return note of $1500.00 I now hold."

25752

JOSEPH C. VIENNEAU,
Appellee,

vs.

WILLIAM BRAZEAU,
Appellant.

APPEAL FROM SUPERIOR COURT
OF Cook COUNTY.

26 I.A. 609

MR. JUSTICE BAYCROFT DELIVERED THE OPINION OF THE COURT.

This record discloses a tale of two terms. Plaintiff brought suit in assumpsit filing the consolidated common counts with affidavit of claim. To this defendant filed a plea of the general issue with an affidavit of merits attached. There was a trial by the court and a finding in favor of plaintiff with judgment thereon for $743, to reverse which defendant has perfected this appeal.

There is practically no dispute as to the facts, which for the most part are established by written documents. Plaintiff is a painting and decorating contractor. Prior to the transaction which resulted in this suit, he had done painting with the Lee Silver Tax Remedies, Inc., which became bankrupt and which transferred his note held by it to defendant, Brazeau. Through a party representing himself to be the agent of defendant, negotiations were opened between plaintiff and defendant for the sale by defendant to plaintiff of two taxes. Plaintiff, after investigating certain taxes in Township 40, R3 at the Glenview house, entered into a contract in July of them. This was on October 13, 1927, when plaintiff gave a check to the order of defendant as payee for the sum of $500 and received from defendant a receipt as follows:

"Received of J. C. Vienneau ($500.00) Five hundred fifty and 00/100 to apply on a/c of the purchase of one (1) pair of Lee Tax Lts.--located in one 2½ at the rear of 1. E. Schlueter at Glenview, Ill., all tattoo mark and other marks of identification to be so placed in writing.

Then the balance of $437.50 due upon said to me (Wm. B. Brazeau) I agree to furnish and transfer title to said taxes and return note of $1500.00 I now hold."

Later, about December 9, 1927, defendant informed plaintiff that because of some defect in the title of the foxes in pen No. 25 delivery could not be made as agreed, but assured plaintiff that he, defendant, would get him two foxes equally as good. Thereupon plaintiff signed an agreement by which he was to get two other foxes. The written contract appears in evidence and is in duplicate. It is in the form of an order addressed to Lea Foxes, Ltd., for one pair of standard bred silver foxes of highquality, for the price of $745. The writing states that $100 has been deposited and that the balance of $645 is payable in two months. One of the foxes, a male of the strain "Magic," is described as "DJ 28 E Pale Silver, Tip," and the other, a female of the strain "Magic," is described as "DG 87E Med. Silver, Tip." The writing states that these foxes would score 92 points or more, would be pure bred and would be registered in either The Prince Edward Island Silver Black Fox Breeders Association or The Canadian National Live Stock Records (The Canadian Silver Fox Breeders Association); that every animal should be of good size, well furred and in apparent healthy condition; and it was agreed that in case the foxes were delivered before payment was made in full, the order should constitute and be a lien upon the foxes until the full amount of the purchase price should have been paid. This order was signed by plaintiff as purchaser and by defendant as salesman, and after its execution and delivery to defendant seems to have been accepted by Lea Foxes, Ltd., per John A. Lea, dealer.

Plaintiff from time to time made other payments by checks to the order of defendant and the final payment by check on September 27, 1928, for $200, likewise to the order of defendant. Defendant thereupon delivered to plaintiff two documents, telling him that these showed the title to this pair of foxes. Plaintiff took the documents home and upon examination discovered that the foxes were not adults but only pups. He informed defendant that these foxes were not

later, about December 9, 1947, defendant informed plaintiff that because of some defect in the title of the foxes in pen 6c. 20 delivery could not be made as agreed, but assured plaintiff that no, defendant, would yet mix two foxes equally as good. Thereupon plaintiff signed an agreement by which he was to get two other foxes. The written contract appears in evidence and is in duplicate. It is in the form of an order addressed to Iem Foxes, Ltd., for one pair of standard bred silver foxes of singlegenity, for the price of $748. The writing states that $100 was been deposited and that the balance of $648 is payable in two months. One of the foxes, a male of the strain "Magic," is described as "D1 BB 3 Palo Silver, Tip," and the other, a female of the strain "Magic," is described as "2C 8TR Med. Silver, Tip." The writing states that these foxes would score 82 points or more, would be pure bred and would be registered in either The Prince Edward Island Silver Black Fox Breeders Association or The Canadian Pastoral Live Stock Records (The Canadian Silver Fox Breeders Association); that every animal should be of good size, well furred and in apparent healthy condition; and it was agreed that in case the foxes were delivered before payment was made in full, the order should constitute and be a lien upon the foxes until the full amount of the purchase price should have been paid. This order was signed by plaintiff as purchaser and by defendant as salesman, and after its execution and delivery to defendant seems to have been accepted by Iem Foxes, Ltd., per John A. Iem, dealer.

Plaintiff from time to time made other payments by checks to the order of defendant and the final payment by check on September 27, 1948, for $300, likewise by the order of defendant. Defendant thereupon delivered to plaintiff two documents, telling him that these showed the title to this pair of foxes. Plaintiff took the documents home and upon examination discovered that the foxes were not white but only buff. He informed defendant that these foxes were not

equally as good as those for which he had bargained and that he did not wish to have them delivered. He refused to receive the foxes and demanded that defendant return his money but defendant declined to do so. Plaintiff brought suit, as above stated, and recovered.

Defendant contends in the first place that plaintiff can not recover under the common counts and cites Morris v. Jamieson, 205 Ill. 87, where the plaintiff sued a defendant for violation of his duty as an agent or broker. That case is not applicable here, since plaintiff sues on a different theory, namely, that he is entitled to recover for money had and received, which by means of a contract relation defendant obtained from plaintiff and which in justice defendant ought to return. There are numerous well considered decisions in the Supreme and Appellate courts of this State holding that such an action will lie. In Drennan v. Bunn, 124 Ill. 175, the Supreme court said:

"Where money is paid by one party to another for a given article assumed to be sold but the seller delivers to the purchaser only a worthless imitation of the article, there is a legal fraud and an action for money had and received will lie for the money thus paid for which nothing has been received."

And in Jensen v. Muting, 255 Ill. App. 514, this court said:

"There are many other cases holding in effect that an action will lie for money had and received for the use of the plaintiff whenever by means of a contract relation defendant has obtained money which in justice he ought to return."

See also Bannister v. Read, 1 Gil. (Ill. 92); McClintock v. Lake Forest University, 222 Ill. 468; Arnold v. Dodson, 272 Ill. 377.

Defendant contends in the second place that the finding should have been in his favor because he acted only as the agent of the Fox corporation in the transaction. The court, considering the written documents as well as the oral evidence, found against defendant on that issue. The finding of the court is entitled, upon review in this court, to the same weight as the verdict of a jury

upon review in this court. It has the same weight as the verdict of a jury
defendant on that issue. The finding of the court is entitled,
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should have been in his favor because he acted only as the agent

Defendant contends in the second place that the finding
Forest University, 230 Ill. 466; Arnold v. Cohen, 176 Ill. 377.
See also Baumgarten v. Rosa, 1 Ill. (Ill. App.) 83; Hutchinson v. Lake
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tion will lie for money had and received for the use of the plain-
"There are many other cases holding in effect that an ac-

And in Jansen v. Ewing, 250 Ill. App. 314, this court said:

money thus paid for which nothing has been received."
fraud and an action for money had and received will lie for the
cheser only a wrongful initiation of the article, there is a legal
article assumed to be sold but the seller delivers to the pur-

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124 Ill. 178, the Supreme court said:

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justice defendant ought to return. There are numerous well con-
a contract relation defendant obtained from plaintiff and which in
entitled to recover for money had and received, under by means of
since plaintiff sues on a different theory, namely, that he is
not recover under the common counts and cites Harris v. Logan,
108 Ill. 87, where the plaintiff sued a defendant for violation of
his duty as an agent or broker. That case is not applicable here.

Defendant contends in the first place that plaintiff can
recovered.

decided to do so. Plaintiff brought suit, as above stated, and
did not wish to have them delivered. He refused to receive the
ferson and demanded that defendant return his money but defendant
equally as good as those for which he had bargained and that he

The fact that plaintiff joined with defendant in the written order of December 9th for the purchase of equally "good foxes" would not change the nature of the original transaction which was between plaintiff and defendant, as principals, nor release defendant from his obligations under the original contract as made; neither would the written agreement made between plaintiff and the Fox company on November 25, 1927, for the ranching of these foxes have that effect. Moreover, a letter of the Lea Foxes, Ltd., to defendant dated January 17, 1928, offered in evidence by defendant as his exhibit 2, seems to bear out the contention of plaintiff that in the entire transaction, so far as the actual sale of the foxes was concerned, defendant acted for himself and not as the agent of the company. The evidence in the record justified the court in finding that defendant assumed toward plaintiff in this transaction the relation of principal, and upon that theory defendant is liable. Stone v. Daggett, 73 Ill. 367. The delivery of mere cubs instead of adult foxes would have amounted to the perpetration of a fraud on plaintiff, for which the parties responsible would have been liable. Plaintiff therefore had a right to rescind his contract of purchase and recover the money paid thereon in an action for money had and received.

The judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

The fact that plaintiff joined with defendant in the written order of December 9th for the purchase of equally good forms" would not change the nature of the original transaction which was between plaintiff and defendant, as principals, nor release defendant from his obligations under the original contract as made; neither would the written agreement made between plaintiff and the Fox company on November 25, 1927, for the rescinding of these forms have that effect. Moreover, a letter of the Sun Forms, Ltd., to defendant dated January 17, 1928, offered in evidence by defendant as his exhibit 2, seems to bear out the contention of plaintiff that in the entire transaction, so far as the actual sale of the forms was concerned, defendant acted for himself and not as the agent of the company. The evidence in the record justified the court in finding that defendant assumed toward plaintiff in this transaction the relation of principal, and upon that theory defendant is liable. Stone v. Barrett, 73 Ill. 367. The delivery of more cuts instead of said forms would have amounted to the perpetration of a fraud on plaintiff, for which the parties responsible would have been liable. Plaintiff therefore had a right to rescind his contract of purchase and recover the money paid thereon in an action for money had and received.

The judgment of the Cook court is affirmed.

AFFIRMED.

O'Connor, P. J., and Scanlan, J., concur.

38498

93 A

BESSIE WEISSMAN and
B. PARESKI,
Appellees,

v.

W. P. COONEY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

266 I.A. 609

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This cause was before this court in January, 1931, on a prior appeal by defendant. (Weissman v. Cooney, 259 Ill. App. 673; opinion not published.) On the present appeal plaintiffs have not here filed an appearance or brief.

On June 14, 1928, plaintiffs caused a judgment by confession for $245, on a written lease, to be entered against defendant, the lessee of an apartment in plaintiff's building at No. 7555 South Shore Drive, Chicago. The amount of the judgment was made up of rent claimed to be due for the three months of April, May and June, 1928, at $75 per month, and $20 attorney's fees. In the lease the place stipulated for the payment of the monthly rent in advance was "at the office of Carroll, Schendorf & Boenicke, Inc., Agents, Chicago," and it was further provided that the lessee (defendant) was to have and to hold the premises

"for and during the term commencing on May 1, 1927, and expiring on April 30, 1928, inclusive, and from year to year thereafter, unless and until this lease shall be terminated at the date last above mentioned, or of a like date in any subsequent year thereafter, by the giving by either party to the other of not less than sixty (60) days' notice in writing of such termination, which said notice shall be delivered in person or sent by registered mail, when to the Lessor, at the place stipulated herein for the payment of rent, and, when to the Lessee, at the address of the demised premises."

On July 20, 1928, the court, on defendant's motion supported by his sworn petition opened the judgment, and ordered that the

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BERNIE ALTENBERN and J. DARIENZI, Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
A. A. P. COONEY, Appellant.	266 I.A. 609

MR. PRESIDING JUSTICE QUINLAN DELIVERED THE OPINION OF THE COURT.

This cause was before this court in January, 1931, on a prior appeal by defendant. (Altenbern v. Cooney, 264 Ill. App. 624; opinion not published.) On the present appeal plaintiffs have not been filed an appearance or brief.

On June 14, 1929, plaintiffs caused a judgment by confession for $265, on a written lease, to be entered against defendant, the lessee of an apartment in plaintiff's building at No. 1838 Dowty Place, Chicago. The account of the judgment was made up of rent claimed to be due for the three months of July, July and June, 1929, at $75 per month, and $20 attorney's fees. In the lease the place stipulated for the payment of the monthly rent in advance was "at the office of Carroll, Leonard & Brendon, Inc., Agents, Chicago," and it was further provided that the lessee (defendant) was to have and to hold the premises

"for and during the term commencing on May 1, 1929, and expiring on April 30, 1930, inclusive, and from year to year thereafter, unless and until this lease shall be terminated as the date last above mentioned, or at a time date in any subsequent year thereafter, by the giving by either party to the other at not less than sixty (60) days' notice in writing of such termination, which said notice shall be delivered in person or sent by registered mail, when to the lessor at the place stipulated herein for the payment of rent, and, when to the lessee, at the address of the demised premises."

On July 30, 1929, the court, on defendant's motion entered by his sworn petition opened the judgment, and ordered that the

petition stand as an affidavit of merits and that there be a trial, the judgment in the meantime to stand as security. Defendant filed a demand for a jury trial. In the petition he alleged that "on March 1, 1928, said date being sixty (60) days before the termination of the lease, he gave notice in writing through the United States mails, addressed to said agents of plaintiffs as required by the provisions of the lease, * * of his election to terminate the lease and vacate the premises during April, 1928;" that he vacated them during that month; and that the only rent due to plaintiffs is the sum of $75, for the month of April, 1928, which sum he has tendered to plaintiffs but they have refused and still refuse to accept the same.

The first trial was had in March, 1930, resulting in the court at the conclusion of all the evidence directing the jury to return a verdict for plaintiffs and, upon its being returned, adjudging that the confessed judgment "stand confirmed in full force and effect * * as of the date of the rendition thereof." On defendant's appeal from that judgment, we held for reasons stated in the opinion that the trial court had erred in directing a verdict for plaintiffs and we reversed the judgment and remanded the cause.

The second trial was had before a jury in June, 1931. Plaintiffs made out a prima facie case by the introduction of the lease, etc. Defendant admitted that $75 was due to them for the April, 1928, rent, and offered to pay the amount but the offer was refused. Defendant then introduced certain writings, testified in his own behalf, and, under section 35 of the Municipal Court Act, examined Bessie Weissman, one of the plaintiffs. At the conclusion of all the evidence, and after the jury had been instructed by the court, a verdict was returned finding the issues against defendant and assessing plaintiffs' damages at the sum of $150. Plaintiffs

petition stand as an affidavit of merits and that there be a trial. The judgment in the meantime to stand as security. Defendant filed a demand for a jury trial. In the petition he alleged that "on March 1, 1928, said date being sixty (60) days before the termination of the lease, he gave notice in writing thereof the United States mails, addressed to said estate at Plainville as required by the provisions of the lease, * * of his election to terminate the said lease and vacate the premises during April, 1928." That he vacated them during that month and that the only rent due to Plaintiff is the sum of $48, for the month of April, 1928, which sum he has tendered to Plaintiff but they have refused and still refuse to accept the same.

The first trial was had in March, 1930, resulting in the court at the conclusion of all the evidence directing the jury to return a verdict for Plaintiff and, when the being returned, adjudging that the rendered judgment "stand confirmed in full [text illegible] * * * as of the date of the rendition thereof." In defendant's appeal from that judgment, no help for reversal exists in the opinion that the trial court had erred in directing a verdict for Plaintiff and in refusing the judgment and remanded the cause.

The second trial was had before a jury in June, 1931. Plaintiff made out a prima facie case by the introduction of the lease, etc. Defendant admitted that $48 was due to them for the rent, that suit was filed to try the title and alleged by way of cross petition that Plaintiff had terminated the lease by the notice in writing, and that they were holding over. Defendant then introduced evidence tending to show that it was their own property, and, over objection of the plaintiff, testified that they had purchased same from the Plaintiff. At the conclusion of all the evidence, and after the jury had been instructed by the court, a verdict was returned finding the issues against defendant and awarding Plaintiff damages at the sum of $180. Plaintiff

did not complain of the amount of the verdict but defendant entered a motion for a new trial which was overruled. On June 13, 1931, the judgment order involved in the present appeal was entered, viz: "That the confession of judgment hereinbefore entered on June 14, 1928, be and the same is set aside and vacated. And it is further ordered that the motion for a new trial hereinbefore entered be and the same is overruled, and judgment entered upon the verdict of the jury for the sum of $150, and costs of suit."

From defendant's evidence the following facts appear: Defendant, after signing the lease, commenced his occupancy of the apartment about May 1, 1927, and continued to occupy it until April 12, 1928, when he moved out. Shortly thereafter plaintiffs received the keys and they took possession. On February 16, 1928, defendant received a letter, dated February 15, 1928, signed by plaintiffs' agents and addressed to him, as follows:

"The lease on premises occupied by you continues in force and effect from May 1, 1928, unless you notify us by March 1, 1928 of your intention to cancel same.

This is in accordance with a clause in your lease which provides that either the lessor or lessee may terminate the lease by giving to the other party 60 days' written notice.

We trust it is your intention to continue your tenancy, but if you contemplate moving do not fail to notify us not later than March 1, 1928."

Beneath the signature on the letter, as received by defendant, is the following blank form, in typewriting:

"Reply. Date:

I hereby notify you that I _____ wish to retain the premises above referred to for another term.

_____."

Defendant testified that he kept this letter "in his pocket" until Thursday morning, March 1, 1928, when he personally wrote on it, following the word "Date", the figures "3/1/28," and then filled in the blank on the first line of the "Reply" with the words "do not," and signed his name on the blank line; that he

did not complain of the amount of the verdict but defendant entered a motion for a new trial which was overruled. On June 13, 1931, the judgment order involved in the present appeal was entered, viz: "That the confession of judgment heretofore taken on June 15, 1929, be and the same is set aside and vacated. And it is further ordered that the motion for a new trial heretofore entered be and the same is overruled, and judgment entered upon the verdict of the jury for the sum of $137, and costs of suit."

From defendant's evidence the following facts appear: Defendant, after signing the lease, commenced his occupancy of the apartment about May 1, 1927, and continued to occupy it until April 19, 1929, when he moved out. Shortly thereafter plaintiffs received the keys and they took possession. On February 16, 1929, defendant received a letter, dated February 15, 1929, signed by plaintiffs' agents and addressed to him, as follows:

"The lease on premises occupied by you continues in force and effect from May 1, 1928, unless you notify us by March 1, 1929 of your intention to cancel same.
This is in accordance with a clause in your lease which provides that either the lessor or lessee may terminate the lease by giving to the other party 60 days' written notice.
We trust it is your intention to continue your tenancy, but if you contemplate moving do not fail to notify us not later than March 1, 1929."

Beneath the signature on the letter, as received by defendant, is the following blank form, in typewriting:

"Reply. Date:
I hereby notify you that I ________________ wish to retain the premises above referred to for another term.

".________________________________

Defendant testified that he kept this letter "in his pocket" until Thursday morning, March 1, 1929, when he personally wrote on it, following the word "Date", the figures "3/1/29," and then filled in the blank on the first line of the "Reply" with the words "do not," and signed his name on the blank line; that he

procured an envelope, personally addressed it in the name and address of plaintiffs' agents, put the letter in the envelope and dropped it "in a United States mail box." The letter was not received until Monday morning, March 5th. When received, the envelope (produced by plaintiffs and introduced by defendant) bore the post-mark, "Chicago, Mar. 4th, 4 p. m., 1928." On Saturday, March 3rd, before plaintiffs' agents had received the letter, they wrote to him as follows: "Not having heard from you, your lease on the apartment you now occupy continues in force and effect on and after April 30, 1928, and we have so entered same on our books." On Monday, March 5th, after they had received the letter, they wrote to defendant in part as follows: "You will have already received a letter from this office to the effect that inasmuch as we have not heard from you on or before March 1st, your lease was automatically renewed. Under the existing conditions, you are obligated to take care of the rental of this apartment for period May 1, 1928, to April 30, 1929, and from year to year thereafter until lease is cancelled as per stipulated clause in lease." Defendant further testified, notwithstanding the receipt of these letters, that he vacated the apartment on April 12, 1928; that he "was never given a copy of the lease;" that the check for $75, which he forwarded to said agents at the time he vacated the apartment, in payment of the April, 1928, rent, was returned to him; and that he "never gave them any other check." He introduced the check. On the top of the back of it is the endorsement: "For rental April, 1928, * * * final rental due, and completing full payment of lease." He further testified that the reason the check was returned to him was because of the endorsement. Bessie Weissman, one of the plaintiffs, testified that after defendant vacated the apartment it "was vacant a whole year;" that she "tried to re-rent it for a whole

vacant a whole year," that she "tried to re-rent it for a whole
year", testified that after defendant vacated the apartment it "was
one because of the endorsement. Beside [illegible], one of the plain-
further testified that the reason the check was returned to him
final rental fee, and completing full payment of lease." He
back of it is the endorsement: "For rental April, 1928." * * *
then any other check." He interlined the check. On the top of the
April, 1928, rent," was returned to him and that he "never have
agents at the time he vacated the apartment, in payment of the
the lease;" that the check for $75, which he forwarded to said
apartment on April 1st, 1928; that he "was never given a copy of
motivating/sending the receipt of these letters, that he received the
as per stipulated clause in lease." Defendant further testified,
30, 1929, and from year to year thereafter until lease is cancelled
care of the rental of this apartment for period May 1, 1928, to April
not heard from you on or before March 1st, your lease was automatically
renewed. Under the existing conditions, you are obligated to take
a letter from this office to the effect that inasmuch as we have
to defendant in part as follows: "You will have already received
On Monday, March 26th, after they had received the letter, they wrote
and after April 30, 1928, and we have no entered same on our books."
on the apartment you now occupy continues in force and effect on
wrote to him as follows: "Not having heard from you, your lease
March 3rd, before plaintiffs' agents had received the letter, they
the post-mark, "Chicago, Mar. 4th, 4 P. M., 1928." On Monday,
envelope (produced by plaintiffs and introduced by defendant) bore
received until Monday morning, March 5th. When received, the
dropped in "in a United States mail box." The letter was not
address of plaintiffs' agents, put the letter in the envelope and
procured an envelope, personally addressed it in the name and

year;" and that when she did so, she "gave a two months' concession" to get it occupied.

On the second trial the evidence was substantially the same as on the first. In our former opinion we said:

"It will be observed that in the letter of plaintiffs' agents, dated February 15th, defendant is advised that the lease will continue in force and effect from May 1, 1928, unless 'you notify us by March 1, 1928, of your intention to cancel same,' and that in the letter no suggestion is made that such notification should be sent by registered mail. We think that the letter, especially as it appears from the evidence that defendant was 'never given a copy of the lease,' which was drafted by plaintiffs' agents, should be considered as amounting to a waiver of the provision of the lease that defendant's notification, if sent by mail, should be by registered mail. Such or similar provisions in leases may be waived (35 Corpus Juris, p. 1020, sec. 149.) And we do not think that the fact that the envelope containing defendant's letter bears a post-mark, indicating that the latter was not mailed until March 4th, conclusively and as a matter of law overcomes defendant's testimony that he personally mailed it early in the morning of March 1st, in apt time to comply with the provisions of the lease and plaintiffs' letter of February 15th. In our opinion under the conflicting evidence it was for the jury, properly instructed, to determine whether or not defendant's letter, containing notice of the termination of the lease, was mailed on March 1st or March 4th. It has been decided that a post-mark on the envelope of a letter is not conclusive, but only prima facie, evidence of the date of mailing. (Shelburne Falls Bank v. Townsley, 102 Mass. 177, 181; New Haven Bank v. Mitchell, 15 Conn. 206, 224; 16 Cyc. p. 1069, sec. d, 1.)"

On the second trial the jury were fully and fairly instructed. Two instructions offered by defendant were refused. One of the given instructions is:

"The Court further instructs you that it is for you to decide whether or not the defendant's letter, containing notice of the termination of the lease was mailed on March 1st or whether it was mailed later. The Court further instructs you that notwithstanding the provisions in the lease that notice by letter shall be by registered mail, it is the law in this case that the fact that the notice was not sent by registered mail is waived and if same was sent by ordinary mail within the time specified in the lease then said notice, if so given, would be sufficient in law though not registered."

Defendant's counsel does not contend that the verdict in plaintiff's favor is not supported by the evidence, or that the court erred in the giving of or the refusal to give any instruction, or that the above quoted clause of the lease is not binding upon defendant.

year;" nor that when she did so, she "gave a two months' pos-
session" to what was completed.

On the second trial the evidence was substantially
the same as on the first. In our former opinion we said:

"It will be observed that in the letter of plaintiff's
agents, dated February 25th, addressed to widows that the lease
will continue in force and effect from July 1, 1920, unless 'you
notify me by March 1, 1920,' of your intention to accept terms,'
and that in the letter no suggestion is made that such notification
should be sent by registered mail. We think that the letter,
especially as it appears from the evidence that defendant was 'never
given a copy of the lease,' which was drafted by plaintiff's agents,
should be considered as amounting to a waiver of the provision of
the lease that defendant's notification, if sent by mail, should be
by registered mail. Such or similar provisions in leases may be
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circumstances evidence was for the jury, properly instructed, to
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not conclusive, but only prima facie, evidence of the date of mail-
ing. (Wellborne Mills Power v. Ingraham, 100 Ga. 117, 119; Hall Dep-
tford Peck v. Wisconsin, 12 Conn. 699; 31 Cyc. p. 1049, note
9, p. 1.)"

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Defendant's counsel does not contend that the verdict in
Plaintiff's favor is not supported by the evidence, or that the court
erred in the giving of or the refusal to give such instructions, or that
the above quoted clause of the lease is not binding upon defendant.

(See, Williams v. Veeder, 195 Ill. App. 413, 415; Morris v. Taylor, 199 Ill. App. 588, 592, holding similar covenants in leases to be valid and binding.) Only two contentions are made and argued. One is that the verdict is a compromise, is illogical, and is at variance with the theories of both parties. Counsel says that either plaintiffs should have recovered the full amount of the original judgment as confessed, that is, for all the rent claimed by them to be due when the action was commenced, $225 and $20 attorneys' fees (including the two months of May and June, 1928), or only $75, for the month of April, 1928, admitted by defendant to be due. The contention is without merit. It merely amounts to a complaint by defendant that the damages awarded to plaintiff by the jury are too small. While plaintiffs might have complained of this had they seen fit so to do, defendant cannot successfully do so. (Reid v. Huston, 20 Ill. App. 43, 49-50; Hedenberg v. Graham, 69 Ill. App. 142, 144-5; People's Bank v. Fernald, 252 Ill. App. 5, 9; Heyman v. Heyman, 210 Ill. 524, 540-1.)

Equally without merit in our opinion is counsel's other contention, which is, as we understand it, that the court erred in setting aside the confessed judgment in its entirety and entering a separate judgment, following the verdict in favor of plaintiffs for $150. In support of the contention counsel cites the case of Morris v. Taylor, 199 Ill. App. 588, 591, where it is said: "The judgment is in proper form. When the issues were found for the plaintiffs it was according to well settled practice in nisi prius courts to restore the judgment by confession, * *. The entry of a separate and independent judgment would have been erroneous." In that case a judgment by confession on a lease had been entered against the defendant. Afterward the judgment was opened and defendant given

(See, Hillmon v. Verdier, 108 Ill. App. 613, 618; Norris v. Taylor, 139 Ill. App. 888, 892, holding similar covenants in leases to be valid and binding.) Only two contentions are made and argued. One is that the verdict is a compromise, in illegal, and in at variance with the theories of both parties. Counsel argue that either plaintiff's should have recovered the full amount of the original judgment on contract, that is, for all the rent claimed by them to be due when the action was commenced, $125 and not $75, for the months of April, 1922, subsequent to be due. The term (including the two months of May and June, 1922), or only $75, counsel for defendant claims successfully do no. (Gold v. Kenney, 211 Ill. App. 49; 49-50; Anderson v. Dresser, 11 Ill. App. 143, 144-8; People's Bank v. Barnard, 208 Ill. App. 8; Kenney v. Bowen, 230 Ill. 824, 840-1.)

Equally without merit in our opinion is counsel's other contention, which is, as we understand it, that the court erred in setting aside the confessed judgment in its entirety and entering a separate judgment, following the verdict in favor of plaintiffs for $150. In support of the contention counsel cites the case of Norris v. Taylor, 139 Ill. App. 888, 892, where it is said: "The judgment is in proper form. From the issues were found for the plaintiffs it was according to well settled practice in this State to enter judgment by confession, * *. The only of a separate and independent judgments could have been entered. In this case a judgment by confession on a issue had been entered against the defendant. Inasmuch the judgment was opened and defendant given

leave to defend, - the judgment in the meantime to stand as security. After a trial without a jury the court found the issues in the plaintiff's favor for the full amount of their claim and adjudged that the confessed judgment stand confirmed and in full force as of the date of its rendition. And the appellate court affirmed that judgment. In the present case, in view of the fact that the jury's verdict was less than the full amount of plaintiffs' claim, the court could not properly confirm the confessed judgment in its entirety, and very properly vacated it and entered a new judgment against defendant in an amount in accordance with the jury's verdict. It is well settled that, where a confessed judgment has been opened and the defendant given leave to defend, the burden rests upon the plaintiff to prove his case the same as if there had been no confessed judgment entered (Cohen v. Rosenthal, 207 Ill. App. 331, 332), and the cause of action is in the same state as if commenced in the ordinary procedure by summons (George J. Cook Co. v. Johnson, 179 Ill. App. 83, 86.) And in cases where a confessed judgment has been opened, and the defendant shows that at least a portion of the judgment is improper, it has been decided that the court may reduce the judgment or set it aside altogether. (Fleming v. Jencks, 22 Ill. 475, 478; McGuire v. Campbell, 58 Ill. App. 188, 191.)

The judgment appealed from, entered June 18, 1931, should be and is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

remand and pending," it," because.

ARGUMENT

be end in attained.

The judgment obtaining from, entered June 12, 1903, should

an 117, 427; cited Bowditch v. Donnelly, 68 111. App. 324, 327;

may redress the judgment or set it aside altogether. (Lindley A.Jacobs,

judgment has been obtained, and the defendant thereby has at least a par-

tion of the judgment in injunction, it has been decided that the court

ex it appeared in the original Declaration of Damages (Record p. page 10;

Ap. Johnson, 128 111. App. 83, 86.) and in every phase a sufficient

207 111. App. 227, 232), and the cause of action is in the same state

as it would have been no conclusive judgment entered (Record p. Dunning,

cation, the Bureau rests upon the plaintiff to prove all only the same

in conflict the concerned judgment in its entirety, and each pleading

time the full amount of plaintiffs claim, the court could not proceed-

ings because same, in view of the fact that the Jury's verdict was less

of its rendition. and the objective court declined that judgment. In

entered judgment stood continued and in full force as of the date

fact's favor for the full amount of their claim and adjudged that the

plaintiff within a July the court found the issues in the plain-

tiff to declared, - the judgment in the execution to stand as security.

94 A

35522

MARTHA MONHEIT, executrix of the last will of DORA HERBST, deceased,
Appellee,

v.

HARRY M. GOLDSTINE,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 609[3]

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT:

By this appeal defendant seeks to reverse a judgment for $1500, rendered against him on May 1, 1931, following the verdict of a jury, in an action for damages for personal injuries received by Dora Herbst in an automobile accident on August 26, 1929.

The action was commenced during the lifetime of Mrs. Herbst on April 5, 1930. To her declaration, consisting of three counts, defendant filed a plea of the general issue and a further plea denying ownership, operation or control of the automobile. On December 8, 1930, her death being suggested, it was ordered that Martha Monheit, as executrix of her last will, be substituted as plaintiff, and an amended declaration, also of three counts, was filed. In the first count it is averred that on August 26, 1929, defendant owned and was driving an automobile in an easterly direction along and upon Lincoln Highway, approaching New Haven, Indiana; that Mrs. Herbst was "an invitee and guest" in the automobile, but had no control or management of it, and was at all times in the exercise of due care for her own safety; that defendant, not regarding his duty, so negligently operated the automobile that it struck with great force and violence "a certain other automobile standing along and upon an intersecting highway," whereby Mrs. Herbst sustained serious and

SEARS

MARTHA NORRIS, executrix of
the last will of JOHN NORRIS,
deceased,

Appellee,

v.

MARY E. GOLDSMITH,

Appellant.

COURT, COOK COUNTY.

APPEAL from Superior

1896 I.A. 809

MR. JUSTICE BAKER delivered the opinion of the Court.

By this appeal interested parties is reviewed a judgment for $2500, rendered October 9th on July 3, 1897, following the verdict of a jury, in an action for damages for personal injuries received on April 8, 1896. We face considerable conflict in the evidence, but the following facts appear to be sufficiently established to support the judgment: On December 8, 1895, his fourth being engaged, it was proposed that Martha Norris, an employee of the plaintiff, should go to Evanston, and Mary Lizzie, a sister of the plaintiff, should accompany her. In the afternoon of said day, the two girls, together with Mrs. Burpee, left the car on Chicago avenue, and walked along the north side of Evanston avenue to the corner of Lincoln street, where they intended to take a car to Evanston. While they were standing on said corner, a car of the Chicago City Railway Company, which was running southwardly on Evanston avenue, and which was approaching the corner at a rapid rate of speed, left the track and ran into the crowd of people standing on the corner, killing Martha Norris and injuring Mary Lizzie and Mrs. Burpee, the latter so seriously that she died on the 10th day of December, 1896. The plaintiff, as administrator of the estate of Martha Norris, deceased, brought this suit against the defendant, the Chicago City Railway Company, to recover damages for the death of his intestate, and Mary Lizzie and Mrs. Burpee brought separate suits against the defendant to recover damages for the injuries received by them. The three cases were consolidated and tried together, resulting in a verdict and judgment in favor of the plaintiff in the case of Martha Norris, deceased, for $2500, and verdicts and judgments in favor of Mary Lizzie and Mrs. Burpee for $1000 each. The defendant appealed from the judgment in favor of the plaintiff, and Mary Lizzie and Mrs. Burpee have prosecuted writs of error to this court to reverse the judgments rendered in favor of the defendant in their respective cases.

permanent injuries, etc. (Here are stated the extent and character of the injuries and expenses incurred for medical care, etc.) The averments of the second and third counts are the same except in the paragraph wherein the particular negligence is charged. In the second count it is averred:

"That it became and was defendant's duty to operate and drive his automobile at a safe and reasonable rate of speed, having regard for the traffic and the use of the way, and so as not to endanger the life, limb and safety of Dora Herbst, then and there in her lifetime; yet * * defendant did not observe his duty in the premises, but on the contrary drove his automobile at a high, dangerous and unreasonable rate of speed, without regard to the traffic and the use of the way, or the character of the neighborhood, in consequence of which negligence defendant's automobile ran into and violently struck a certain other automobile then and there along and upon said highway," etc.

In the third count it is averred:

"That it became and was defendant's duty to operate and drive his automobile with due regard and consideration for the life, limb and safety of Dora Herbst and others then and there; yet * * defendant did not observe his duty in that behalf, but on the contrary, having sufficient and ample time and opportunity to bring his automobile under control and to a stop, drove it into, upon and against a certain other automobile," etc.

On the trial the two witnesses called by plaintiff to testify as to the occurrence were Lena Lewin, a sister of Dora Herbst, and Lillian Zwick, a niece. Both were examined and cross-examined at considerable length. From their testimony the following facts in substance appear: On the day of the accident defendant had three women in his automobile as his guests, - Dora Herbst, then aged 66 years, Lena Lewin, aged 64 years, and Lillian Zwick, aged 31 years. They were travelling between Chicago and Canton, Ohio, their destination, on a much travelled highway. They had passed the city of Fort Wayne, Indiana, and were approaching the town of New Haven in that State. From Chicago to Gary, Indiana, defendant drove the car. From Gary to Fort Wayne Mrs. Zwick drove the car. When she commenced to drive, defendant cautioned her to be careful, stating that the brakes on the car were not in good working order and needed adjustment. At Fort

permanent injuries, etc. (Here are stated the extent and character of the injuries and expenses incurred for medical care, etc.) The averments of the second and third counts are the same except in the paragraph wherein the particular negligence is charged. In the second count it is averred:

"That it became and was defendant's duty to operate and drive his automobile at a safe and reasonable rate of speed, having regard for the traffic and the use of the way, and so as not to endanger the life, limb and safety of [illegible], then and there in her lifetime; yet * * defendant did not observe his duty in the premises, but on the contrary drove his automobile [illegible] and upon said highway," etc.

In the third count it is averred:

"That it became and was defendant's duty to operate and drive his automobile with due regard and consideration for the life, limb and safety of [illegible] and others then and there; yet * * defendant did not observe his duty in that behalf, but on the contrary, having sufficient and ample time and opportunity to bring his automobile under control and to a stop, drove it into, upon and against a certain other automobile," etc.

On the trial the two witnesses called by plaintiff to testify as to the occurrence were Lena Lewin, a sister of Vera Berbst, and Lillian Welch, a niece. Both were examined and cross-examined at considerable length. From their testimony the following facts in substance appear: On the day of the accident deceased had three women in his automobile as his guests, - Vera Berbst, then aged 20 years, Lena Lewin, aged 24 years, and Lillian Welch, aged 23 years. They were travelling between Chicago and Denton, Ohio, their destination, on a most travelful highway. They had passed the city of Fort Wayne, Indiana, and were approaching the town of Ley Haven in that State. From Chicago to Ley, Indiana, defendant drove the car. From Ley to Fort Wayne Mrs. Welch drove the car. When she commenced to drive, defendant cautioned her to be careful, stating that the brakes on the car were not in good working order and needed adjustment. At Fort

Wayne defendant again became the driver of the car and he thereafter drove at such a rapid rate of speed as to pass all the other cars on the road, going in the same direction. Dora Herbst and the other two women repeatedly requested him to drive slower and more carefully. At each request he would slow down for a short time and then resume an average rate of speed of 60 miles an hour. The accident happened about 3 o'clock in the afternoon. It was a bright day, the pavement dry, and the view of the roadway ahead unobstructed. About 100 feet away another automobile was entering the highway from an intersecting road. Defendant then was driving his car at 60 miles an hour. In trying to avoid a collision with this other automobile, after applying his brakes, defendant so lost control of his car that it violently collided with still another automobile which was standing still, parked by the side of the highway. All three of the women were injured. Mrs. Herbst remained unconscious for about half an hour. She was first treated at Canton, Ohio, and afterwards in Chicago. She suffered a fracture of the pelvis bone and other severe and permanent injuries. In Chicago, until she died from a "cerebral hemorrhage" or "stroke of paralysis" in a Chicago hospital on November 21, 1930, she was treated from time to time at her home or in the hospital by Doctor Frisch, who, after her death filed a claim for his services in the probate court against her estate for $1411. He testified that a reasonable charge for all his services would be $1500. During the examination of Mrs. Zwick it appeared that both she and Mrs. Lewin had commenced separate suits for damages against defendant, which were pending. Sidney Herbst, a resident of Kankakee, Illinois, and a son of Dora Herbst, also was called as plaintiff's witness, and he testified as to the bills he had paid for hospital services, etc., rendered for his mother in Chicago after the accident, and as to the extent of her injuries and the nature of the treatment therefor.

to the extent of her injuries and the nature of the treatment thereafter, etc., rendered for Mrs Ashner in Chicago after the accident, and as and he testified as to the bills he had paid for hospital services, and a son of Mrs Ashner, also was called as plaintiff's witness, which were pending. Henry Ashner, a resident of Lawndale, Illinois, Mrs. Levin had commenced separate suits for damages against defendant, during the examination of Mrs. Levin it appeared that both she and 1930, she was created from time to time at her home or in the hospital by Doctor Friend, who, after her death filed a claim for his services in the probate court against her estate for $1611. He testified that a reasonable charge for all his services would be $2000. December" or "attacks of paralysis" in a Chicago hospital on November 23, 1930, she was created from time to time at her home or in the and permanent injuries. In Chicago, until she died from a "cerebral Chicago. She suffered a fracture of the pelvis bone and other severe hour. She was first treated at Canton, Ohio, and afterwards in were injured. Mrs. Ashner remained unconscious for about half an ling still, pinned by the side of the highway. All three of the women it violently collided with motor automobile which was cleaning plan applying his brakes, defendant no less control of the car that an hour. In trying to avoid a collision with this other automobile, an interesting road. Defendant then was driving his car at 40 miles day, the pavement dry, and the view of the roadway cleared unobstructed. about 300 feet away another automobile was entering the highway from accident happened about 2 o'clock in the afternoon. It was a bright and then resume an average rate of speed of 40 miles an hour. The carefully. If each redrawn he would slow down for a short time other two women repeatedly requested him to drive slower and more cars on the road, going in the same direction. Mrs Ashner and the after driving at such a rapid rate of speed as to pass all the other Levine Ackermont again became the driver of the car and he there-

He further testified that the bills contracted for Mrs. Herbst while she was in Canton and all physician's bills remained unpaid. On his cross-examination it appeared that the only heirs-at-law and next of kin of Dora Herbst were plaintiff (her daughter and executrix of her estate) and himself, Sidney Herbst. Mrs. Monheit, plaintiff, did not testify.

At the conclusion of plaintiff's evidence defendant was called as a witness in his own behalf. After he had given his Chicago address his attorney stated that he was "tendering" him as a witness; that, as he understood it, the court had previously expressed an opinion that under section 2 of the Evidence Act he was "not competent to testify either as to the facts of the accident or as to any conversations had regarding it," but that, of course, he could testify if no objection was made. Thereupon plaintiff's attorney objected to the witness testifying as to the matters mentioned and the court ruled that the witness was not competent, and defendant excepted. Defendant's attorney made no offer as to what he expected to prove by the witness, and thereupon stated "We will have to rest; we haven't any defense we can interpose if our client is barred." Thereupon defendant rested and no further evidence was heard.

Several points are urged by defendant's counsel as grounds for a reversal of the judgment. One is that during the trial and during the closing arguments to the jury plaintiff's attorney made improper statements, prejudicial to defendant. A sufficient answer is that defendant has not assigned any errors as to these matters, and hence, the contention need not be considered. (Ditch v. Bennett, 116 Ill. 288, 290-1; Village of Northbrook v. Sterba, 318 Ill. 360, 362; Ozech v. International Harvester Co., 198 Ill. App. 453, 457.)

Counsel also contends that plaintiff's attorney, while the witness Lillian Zwick was on the stand "deliberately brought out

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improper matter regarding alleged offers of compromise." The matter or statement of the witness was brought out originally in an unresponsive answer to a question asked by defendant's attorney on cross-examination. He made no motion to strike out the answer. On re-direct examination plaintiff's attorney asked the witness a question concerning said statement. The witness started to answer, but before she had completed it the court sustained defendant's attorney's objection to the question. Furthermore, we do not think that it appears that plaintiff's attorney sought improperly to bring to the attention of the jury the fact that offers to settle the present suit had been made by defendant or his agent, or that any such offers ever in fact were made. There is no merit in the contention.

Counsel further contends that the court erred "in refusing to permit defendant to testify." Section 2 of our Evidence Act (Cahill's Stat. 1931, Chap. 51, p. 1428,) provides in part:

"No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends * * as the executor * * of any deceased person, * *, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: * *

Third. Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction."

Counsel argues that, because the niece (Mrs. Zwick) of Dora Herbst testified as to the occurrence and also testified that she (Mrs. Zwick) had brought a separate suit against defendant for her personal injuries received in the same accident, it is "a fair construction of the statute to say that she was directly interested in the result of the suit at bar," and that, if she was so directly interested (she having testified as to the occurrence), defendant

was a competent witness to testify thereto. And in support of the contention and argument counsel cites the holdings and decision of our Supreme Court in Van Meter v. Goldfarb, 317 Ill. 620. That suit, unlike the present one, was originally brought under sections 1 and 2 of our Injuries Act (Cahill's Stat. 1931, Chap. 70, p. 1599) for the wrongful killing of a young boy by the defendant in an automobile accident. During the trial a younger brother of the deceased testified as to the occurrence and the court thereafter allowed the defendant also to testify thereto. The verdict and judgment were for the defendant. On appeal to the appellate court the judgment was affirmed, and on further appeal by certificate of importance, the judgment of the appellate court was affirmed. It was contended in the Supreme Court that the trial court committed error in permitting the defendant to testify to the occurrence after one of deceased's next of kin, his said brother, had testified thereto, but the Supreme Court, in denying the contention, held in substance (1) that the right of action for wrongful death as created by the Injuries Act is not for the benefit of the estate of the deceased but is for the benefit of his next of kin, who are the real parties in interest within the meaning of the statute in the Evidence Act, and (2) that in a suit by the administrator of the estate of a deceased person to recover damages for wrongfully causing the death of such person, and wherein one of his next of kin is an occurrence witness and gives his version of the accident, the defendant in such suit is properly permitted to testify under the third exception of section 2 of the Evidence Act, and for the reason that the word "transaction" is used in the statute in a broad sense and includes an occurrence such as an accident resulting in death.

We do not think that there is any substantial merit in counsel's contention, or that the decision and holdings in the

Goldfarb case are here applicable. When the present action was commenced by Mrs. Herbst in April, 1930, it was to recover damages for personal injuries she had received. Before the case was reached for trial, and about 15 months after the accident, she died. Under section 123 of the Administration Act (Cahill's Stat. 1931, Chap. 3, p. 71) her action survived. In Wilcox v. Bierd, 330 Ill. 571, 584, it is said: "Prior to the enactment of the survival statute (Administration Act, sec. 123) an action for personal injuries abated with the death of the injured party in all cases, but since the passage of the survival statute, and under it, if the injured person dies from some other cause than the injury the action for the injury to his person survives to his personal representatives. * * The injuries act of 1853 gave a new cause of action where the injury resulted in death. In cases where the injury resulted in death the common law action abated, but under the act of 1853 the right of action was continued in the name of the legal representatives of the deceased for the benefit of the widow and the next of kin of the deceased." In the present case it does not appear that Mrs. Herbst's death resulted from her injuries received in the accident. While probably, because of her advanced years, those injuries hastened her death, the evidence discloses that she died in a Chicago hospital on November 21, 1930, from a "cerebral hemorrhage" or a "stroke of paralysis". Furthermore, even if it may be said that her injuries "resulted in death," neither the plaintiff (executrix of her estate) nor any of her next of kin testified as to the occurrence. Neither Mrs. Zwick (a niece) nor Mrs. Lewin (a sister) were Mrs. Herbst's next of kin or had a "direct interest" in the outcome of the action. In the Wilcox case, supra, after referring to sections 1 and 2 of the Injuries Act and particularly the words "next of kin," as used in the statute, our Supreme Court said (p. 581): "The words 'next of kin' are used as a technical legal

[illegible] case are here applicable. When the present action was commenced by Mrs. Berks in April, 1930, it was to recover damages for personal injuries she had received. Before the case was reached for trial, and about 15 months after the accident, she died. Under section 1.3 of the Administration Act (Cahill's Stat. 1931, Chap. 3, p. 72) her action survived. In Tilgate v. Baird, 220 Ill. 272, 288, it is said: "Prior to the enactment of the survival statute (Administration Act, sec. 123) an action for personal injuries abated with the death of the injured party in all cases. But since the passage of the survival statute, and under it, if the injured person dies from some other cause than the injury the action for the injury is not affected. * * * The injuring act of 1853 gave a new cause of action where the injury resulted in death. In cases where the injury resulted in such the common law action abated, but under the act of 1853 the right of action was continued in the name of the legal representatives of the deceased for the benefit of the widow and the next of kin of the deceased." In all present case it does not appear that Mrs. Berks's death resulted from her injuries received in the accident. While probably, because of her advanced years, those injuries hastened her death, the evidence discloses that she died in a Chicago hospital on November 21, 1930, from a "acute[illegible] pneumonia" or a "stroke of paralysis". Furthermore, even if it may be said that her injuries "resulted in death," neither the plaintiff (executrix of her estate) nor any of her next of kin testified as to the pecuniary [illegible] either Mrs. Dwick (a niece) nor Mrs. Levin (a niece) were Mrs. Berks's next of kin or had a "direct interest" in the outcome of the action. In the Tilgate case, supra, after referring to sections 1 and 2 of the Injuries Act and particularly the words "next of kin," as used in the statute, our Supreme Court said (p. 287): "The words 'next of kin' are used as a technical legal

phrase in their ordinary technical sense. * * The term 'next of kin,' in its technical, legal meaning, means persons nearest in degree of blood surviving. In its practical use the term has come to mean, ordinarily, those persons who take the personal estate of the deceased under the statutes of distribution. * * Under our statute on descent * *, personal property descends first to the deceased's children" (in the present case there were two) "and their descendants in equal parts, - the descendants of the deceased child or grandchild taking the share of its deceased parents in equal parts." In the case of Ogden v. Keck, 253 Ill. App. 444, it is decided in substance that in an action for the wrongful death of an intestate, where neither the administrator nor any of the next of kin testified, although one of them was available as a witness, the defendant was not a competent witness to testify in his own behalf as to the occurrence. And in commenting upon the cited Goldfarb case, the court said (p. 450) "The Goldfarb case only permits a defendant to testify where either the administrator or next of kin has testified in the first instance to the facts concerning the happening of the accident, and, in that event, the defendant is then permitted, under the provisions of the Exception 3 of section 2 of the Evidence Act, * *, to testify to the same transaction."

Defendant's counsel further contends in substance that, after the verdict had been returned, the court erred in overruling defendant's motion in arrest of judgment. It appears that, as the accident happened within the State of Indiana, the court, at the request of defendant, gave to the jury the following instruction:

"The jury are instructed that there was in force and effect in the State of Indiana on the date of the accident herein sued on a certain statute which is in words and figures as follows:

No person who is transported by the owner or operator of a motor vehicle as his guest without paying for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss in case of accident, unless such accident shall have been intentional or caused by his reckless disregard for the rights of others."

the rights of others."

simply have been indictment or damage by his reckless disregard for

a motor vehicle on his guest without paying for such transportation,

that there is a value of value for passenger automobile guests who ride in

In the present case, the plaintiff was the guest of the defendant

certain statute which is in words and figures as follows:

No person who is transported by the owner or operator of

in the state of Indiana on the route of the accident herein sued on a

"The jury are instructed that there was in force and effect

[illegible] in their ordinary temporal sense. * * * The term 'next of kin,' in its technical, legal [illegible], means persons entitled in degree of blood relation. In the present case the term has come to mean, ordinarily, those persons who make the personal estate of the deceased under the statutes of distribution. * * * Under our statute an amount * * * [illegible] deceased [illegible] to the deceased's children" (In the present case there are two) "and their descendants in equal parts," - the descendants of the deceased would be [illegible] taking the share of the deceased parents in equal parts." In the case of Dolan v. Leek, 205 Ill. App. 444, it is decided in substance that in an action for the wrongful death of an intestate, where neither the administrator nor any of the next of kin testified, although one of them was available as a witness, the defendant was not a competent witness to testify in his own behalf as to the occurrence. And in commenting upon the other [illegible] case, the court said (p. 450) "The [illegible] case only permits a statement to testify where either the administrator or next of kin has testified in the first instance to the facts concerning the happening of the accident, and, in that event, the statement is then permitted, under the provisions of the [illegible] section 3 of the Evidence Act, * * *, to testify to the same transaction."

Defendant's counsel further contends in substance that, after the verdict had been returned, the court erred in setting aside the verdict and in granting a new trial. It appears that, on the motion of defendant, duly to the jury the following instruction:

It is not argued that the evidence did not prove that at and before the time of the accident defendant was driving his automobile with a reckless disregard for the rights of others, but the argument is that plaintiff should not be allowed to recover any judgment because her declaration did not sufficiently allege such reckless disregard of the rights of others by defendant at the time and place. After carefully considering the allegations of plaintiff's declaration, and particularly those portions italicized above, we cannot agree with counsel's contention or argument, particularly in view of the jury's verdict after they had been advised of the provisions of the Indiana statute. We think that the allegations are sufficient after verdict to sustain the judgment. In Illinois Central R. Co. v. Simmons, 38 Ill. 242, the action was for damages for personal injuries received by Simmons while a passenger on one of the railroad's company's trains and occasioned, as charged, by the negligence of the railroad company. There was a verdict and judgment for Simmons. It was contended on appeal that the declaration was insufficient to sustain the judgment because it "contained no averment that appellee (Simmons) was without fault, or that he exercised proper care to avoid the injury." The judgment was affirmed. In denying the contention our Supreme Court said (pp. 243-4):

"The majority of this court is inclined to the opinion that if the declaration was defective in that particular, it is cured by the verdict. The principle is, 'when anything is omitted in the declaration, though it be matter of substance, if it be such, as that without proving it at the trial the plaintiff could not have had a verdict, and there be verdict for the plaintiff, such an omission shall not arrest the judgment.' 2 Tidd's Practice, 919. * * In Stanley v. Whipple, 2 McLean 35, it was held that after verdict, defects in substance were cured, if, from the issue in the case, the facts omitted, or defectively stated, may fairly be presumed to have been proved on the trial. In 1 Ch. Pl. 712, it is said where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict."

"The materiality of this court is limited to the opinion that it the decision was defective in that particular, it is cured by the verdict. The principle is, 'when objecting is omitted in the declaration, though it be matter of substance, if it be such as that without proving it at the trial the plaintiff could not have had a verdict, and there be verdict for the plaintiff, such an omission shall not arrest the judgment.' 2 Tidd's Practice, 919. * * In Hunter v. Fairfax, 3 Wilson 129, it was held that after verdict, defects in substance were cured, if from the issue in the case, the facts omitted, or defectively stated, may fairly be presumed to have been proved on the trial. In 1 Ch. Pl. 712, it is said where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict."

It is not argued that the evidence did not prove that at and before the time of the accident defendant was driving his automobile with a two-flues disregard for the rights of others, but the argument is that plaintiff should not be allowed to recover any judgment because her contributory negligence directly and proximately caused the injuries complained of. The question of whether plaintiff's negligence was the proximate cause of her injuries was a question of fact for the jury, and its finding thereon is conclusive on appeal that the negligence was not the proximate cause. There was a verdict and judgment for Simmons. It was contended on appeal that the negligence was insufficient to sustain the judgment because it "consumed no evidence that supports the injury." The judgment of the district court was affirmed. In denying the contention (Simmons) was without merit, as that he exercised proper care to avoid the injury." The judgment was affirmed. In denying the contention the Supreme Court said (p. 881-4):

These principles have repeatedly been sanctioned in subsequent decisions of our Supreme Court. (Chicago & Alton R. Co. v. Clausen, 173 Ill. 100, 103; Sargent Co. v. Baublis, 215 id. 428, 430; Danley v. Hibbard, 222 id. 88, 89-90.)

Defendant's counsel does not contend that the verdict of $1500 is excessive or that there was error prejudicial to defendant in the giving of any of the instructions offered by plaintiff.

For the reasons indicated the judgment of the Superior court is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

these principles have repeatedly been sanctioned in subsequent decisions of our Supreme Court. (Pierce v. Allen, 5 Pet. 184, 8 L. Ed. 92; Lawrence v. Chandler, 179 Ill. 218, 53 N. E. 628; Peterson v. Hamilton, 199 Ill. 172, 65 N. E. 128; Hadley v. Hibbard, 202 Ill. 84, 66 N. E. 1049.)

Defendant's counsel does not contend that the verdict of $1500 is excessive or that there was error prejudicial to defendant in the giving of any of the instructions offered by plaintiff. For the reasons indicated the judgment of the Superior Court is affirmed.

Affirmed.

Barker and Seaman, JJ., concur.

35563

SUSANNA MURPHY, administratrix of estate of JAMES F. MURPHY, deceased,

Appellant,

v.

WALTER NEHREBECKI,

Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

266 I.A. 609

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for the wrongful killing of James F. Murphy in an automobile accident about 6:45 o'clock on the morning of September 27, 1929, at or near the intersection of Western and Lunt avenues, Chicago, there was a jury trial in May, 1931, resulting in a verdict and judgment in favor of defendant, and plaintiff appealed. Defendant has not entered an appearance or filed a brief in this court. Plaintiff's sole ground for a reversal of the judgment is the claimed error of the trial court in the giving of certain instructions offered by defendant and in the refusal to give other instructions offered by plaintiff.

Plaintiff's declaration consisted of nine counts charging defendant with negligence in different stated particulars, and nine counts charging defendant with willful and wanton negligence. To the declaration defendant filed a plea of the general issue.

The evidence was conflicting. Plaintiff's evidence tended to show the following facts: Murphy was crossing Western avenue in an easterly direction on the north cross-walk of Lunt avenue and was struck by a Chevrolet automobile driven by defendant northerly at a speed of over 40 miles an hour. He died shortly thereafter as the result of the injuries received. While attempting to make the

25869

ATLAS MANUSCRIPT
Liberty.
A.
Liberty,
deserted,
MERRAY STREET, Hughes Elevator
at mouth of Timber R, CLOUD,
CHOUTEAU COUNTY, MONTANA.
26 I.A. 609,
copy, CASE CLOSED,
Master Book Atlas

25. POSITION INDICATING DEVICE MOUNTED ON STANDS ON TOP CHEST.

In an action for damages for the wrongful killing of James F. Murphy in an automobile accident which occurred on the morning of September 27, 1933, it is error for the introduction of testimony and issue thereon, Chicago, Rock Island & Pacific Railway Company, 1933, resulting in a verdict and judgment in favor of defendant, and plaintiff appealed. Affirmed. Plaintiff sues from a point lying in Ray, 1933, resulting in a crossing, Chicago, Rock Island & Pacific Railway Company, 1933, resulting in a verdict and judgment in favor of defendant, and plaintiff appealed. Affirmed. Plaintiff sues from a point lying in Ray, 1933, resulting in a crossing, Chicago, Rock Island & Pacific Railway Company, 1933, resulting in a verdict and judgment in favor of defendant, and plaintiff appealed. Affirmed. Plaintiff sues from a point lying in Ray, 1933, resulting in a crossing, Chicago, Rock Island & Pacific Railway Company, 1933, resulting in a verdict and judgment in favor of defendant, and plaintiff appealed. Affirmed.

result of the injuries received. Fifty witnesses to whom the signal of over 41 miles an hour. He then abruptly discovered an car struck by a locomotive consisting cylinders on a northerly direction on the north-main-track of that company did not to whom the following facts should the essential testimony in an

The evidence was conflicting. Plaintiff's evidence tended to show the automobile stopped at the crossing, and then proceeded slowly in low gear over the tracks, and was struck by the locomotive of the defendant company while it was traveling at a speed of 40 miles an hour. The engineer and fireman testified that they did not see the automobile approaching the crossing until it was within a few feet of the locomotive, and that they then did all they could to stop the train, but were unable to do so before the collision occurred. Plaintiff's evidence tended to show that the automobile was approaching the crossing at a speed of 40 miles an hour. The engineer and fireman testified that they did not see the automobile approaching the crossing until it was within a few feet of the locomotive, and that they then did all they could to stop the train, but were unable to do so before the collision occurred. Plaintiff's evidence tended to show that the automobile was approaching the crossing at a speed of 40 miles an hour. The engineer and fireman testified that they did not see the automobile approaching the crossing until it was within a few feet of the locomotive, and that they then did all they could to stop the train, but were unable to do so before the collision occurred. Plaintiff's evidence tended to show that the automobile was approaching the crossing at a speed of 40 miles an hour. The engineer and fireman testified that they did not see the automobile approaching the crossing until it was within a few feet of the locomotive, and that they then did all they could to stop the train, but were unable to do so before the collision occurred.

Plaintiff's testimony consisted of nine counts charging defendant with various negligence. In addition to the ordinary allegations of negligence, one was that defendant did not sound the whistle or ring the bell of the locomotive as required by statute. Plaintiff's testimony consisted of nine counts charging defendant with various negligence. In addition to the ordinary allegations of negligence, one was that defendant did not sound the whistle or ring the bell of the locomotive as required by statute. Plaintiff's testimony consisted of nine counts charging defendant with various negligence. In addition to the ordinary allegations of negligence, one was that defendant did not sound the whistle or ring the bell of the locomotive as required by statute.

The evidence was conflicting. Plaintiff's evidence tended to show the following facts: Plaintiff was driving an automobile in a northerly direction on the north-main-track of that company did not sound the whistle or ring the bell of the locomotive as required by statute. Plaintiff's testimony consisted of nine counts charging defendant with various negligence. In addition to the ordinary allegations of negligence, one was that defendant did not sound the whistle or ring the bell of the locomotive as required by statute.

crossing the traffic signals showed green lights, indicating that persons or vehicles going east or west on Lunt avenue might proceed. When he was slightly more than half way across Western avenue he was struck. At the time there was another Ford automobile, to the right of defendant's car, also moving at an excessive rate of speed northerly in Western avenue. Both of the cars had "crashed" the red lights, indicating that traffic moving northerly or southerly in Western avenue should not proceed. After the collision defendant's car stopped or was compelled to stop, but the Ford car proceeded onward, and it was not ascertained who its driver was. The neighborhood was fairly well built up, and there were buildings on each of the four corners of the intersection. The defendant was employed as a machinist in a manufacturing plant in Evanston, Illinois, several miles away, and at the time was on his way to work. He was due at the plant at 7 o'clock a. m.

Defendant's evidence tended to show that defendant before reaching the intersection, and while travelling northerly in Western avenue, was moving at a speed not in excess of 25 miles an hour, and, immediately to his right and slightly ahead of him, the Ford car was proceeding in the same direction and at about the same speed; that just before the intersection was reached the red lights changed to brown and then to green and, without stopping, both cars proceeded to cross the intersection; that the Ford car, operated by said unknown driver, struck Murphy and, as it did so, it swerved to the left and in front of defendant's car; that defendant attempted to avoid colliding with the Ford car, but could not, and as a result the front of defendant's car was so damaged that it could not thereafter be run without having repairs made on it; and that defendant's car did not at any time collide with Murphy.

After considering the pleadings, the conflicting evidence

and the given and refused instructions, we are of the opinion that the judgment should be reversed and the cause remanded for a new trial, because of the given instructions offered by defendant and the refusal to give certain instructions offered by plaintiff.

It is well settled that where the evidence is conflicting on material facts the instructions, as given by the court, should be accurate and should be free from error calculated to mislead the jury. (Swan v. People, 98 Ill. 610, 612; Peters v. Madigan, 262 Ill. App. 417, 421.) Some of the given instructions, offered by defendant, are of this character. Furthermore, many of them contained prejudicial reiterations of the principal of the necessity, in order to warrant a recovery against defendant, of plaintiff's intestate being in the exercise of due care and caution for his own safety at the time and place. (Wood v. Illinois Central R. Co., 185 Ill. App. 180, 184; Daubach v. Drake Hotel Co., 243 Ill. App. 298, 305); and some, although directing a verdict for defendant, ignored the issue of the willful and wanton negligence of defendant as charged in plaintiff's declaration and sustained by plaintiff's evidence (Mantonya v. Wilbur Lumber Co., 251 Ill. App. 364, 370.) If defendant was guilty of willful and wanton negligence, as defined in Heidenreich v. Brenner, 260 Ill. 439, 446, and as plaintiff's evidence tended to show, even if plaintiff's intestate had been guilty of contributory negligence, such negligence would not constitute a complete defense to the present action, as stated in some of defendant's given instructions. (Wabash R. Co. v. Speer, 156 Ill. 244, 251; Mantonya v. Wilbur Lumber Co., supra.) And we think that some of plaintiff's offered instructions, which the court refused to give, should have been given. We deem it unnecessary to set them forth or discuss them. They were not sufficiently covered by other given instructions.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Kerner and Scanlan, JJ., concur.

35584

ANTONI FATICATI, administrator of estate of JAMES FATICATI, deceased,
Appellee,

v.

CHRISTIAN PASCHEN, JACOB PASCHEN and HENRY PASCHEN, doing business as Paschen Brothers,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 610

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse a judgment for $5,000, entered against them on May 16, 1931, following the verdict of a jury in an action for damages for the wrongful killing of James Faticati, as the result of an automobile accident on the morning of December 13, 1928. The action was commenced on January 30, 1929. Plaintiff's amended declaration was filed on April 11, 1930, to which defendants filed a plea of the general issue; a special plea denying the ownership, operation or control of the motor truck involved; a special plea to the effect that plaintiff's intestate and defendants were subject to and had accepted the provisions of the Illinois Workmen's Compensation Act; and a special plea to the effect that the amended declaration "failed to allege" that the present action was instituted within one year from the death of plaintiff's intestate. During the trial all special pleas except the one last mentioned were withdrawn.

Plaintiff's amended declaration consisted of two counts. In the first it is averred in substance that on December 13, 1928, defendants, by an agent or servant, were operating their motor vehicle, commonly called a truck, upon and along a public highway, known as South Water street (Wacker drive), in Chicago, at the

28284

PATCHETT PATRICK, machinist,
of estate of James PATCHETT,
deceased,

Plaintiff,

-v-

CHRISTIAN STRONG, ITHAM MORRIS
and HENRY A STRONG, doing business
as Premier Brothers,

Defendants.

A.

Plaintiff,

PATCHETT PATRICK, machinist,
of estate of James PATCHETT,
deceased,

-v-

CHRISTIAN STRONG, ITHAM MORRIS
and HENRY A STRONG, doing business
as Premier Brothers,

Defendants.

2666 I.A. 610

MR. HAMILTON DOLLIN CHARLES appeared and entered an order.

By this ninety day order, plaintiff's solicitor, commonly called a timer, also cited a Public Bylaw, relating to the use of motor vehicles. Dr an motor or another. Date directing their motor in the first it be entered in accordance first on December 13, 1920, Plaintiff's amended particulars consisted of two counts. the due last mentioned were alternate.

Plaintiff's statement of claim set out that on December 13, 1920, Patchett was injured while driving one Ford motor car from the south of the Illinois Central's Underpass road; and a claimed that the defendants were negligent to and permitted the particulars of injured; a special plea to the effect that plaintiff's injuries were caused by the negligence, obstruction or control of the motor truck which defendants first a Ford of the Premier Import & Special Car Company, to Plaintiff's amended particulars were filed on April 21, 1922, to December 13, 1920. The action was commenced on January 24, 1922.

Patchett, as the result of an unfortunate accident on the morning of a July in an action for damages for the personal injuries of James $5,000, entered against them on May 13, 1921, following the service of the writ of summons on April 21, 1921.

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intersection with another public highway, known as the lower level of Michigan avenue; that while plaintiff's intestate in his lifetime was walking in an easterly direction on South Water street and was in the exercise of due care for his own safety, defendants by said agent or servant so negligently operated and drove said truck that it ran against or over plaintiff's intestate and so severely injured him that he died on the same day as the direct result of his injuries; and that he left him surviving as his heirs-at-law and next of kin Teresa Faticati, his widow, and two daughters and two sons (naming them) who by reason of his death were injured pecuniarily, etc. In the second count the particular negligence charged was the careless and negligent driving and moving of the truck "in an easterly direction upon and along South Water street and up to and across the intersection of Michigan avenue at a high and dangerous rate of speed, without keeping a reasonable and careful lookout for persons who might be upon said highway and without giving any reasonable warning of the approach of said motor vehicle."

On the trial plaintiff's only occurrence witness was Michael Scialo. Plaintiff also called as a witness John Woods, a police officer, who appeared just after the accident happened. Defendants called three witnesses; Larson, the driver of the truck; Tuckin, who saw the body of plaintiff's intestate lying in the street; and Theodore Olsen, another police officer, who was called to the place after the accident had happened. The principal witnesses were Scialo and Larson and their testimony was conflicting. Certain photographs of the scene of the accident were introduced in evidence and are in the present transcript.

The accident occurred about 7 o'clock in the morning. Defendants were doing certain construction work on the south side of South Water street. West of the lower level of Michigan avenue,

and on the south side of South Water street, there was a shanty and a loading platform. At places pedestrians were obliged to walk in the street, where also motor vehicles moved. Sciale testified in substance that on the morning in question he went to the location to look for a job; that he came down from the upper to the lower level of Michigan avenue by a stairway; that as he reached the bottom stair on the east side of Lower Michigan avenue he saw the deceased walking east on the south side of South Water street and "close to the building on the southwest corner;" that the moving truck was about 5 feet behind deceased, both going easterly; that the right front wheel or a front part of the truck struck deceased, and he fell to the ground; that the truck continued to move easterly, and stopped with its rear end about 10 or 12 feet east of where deceased's body was lying; and that there were no lights on the truck. The testimony of Larson, the driver of the large, 5-ton truck, was to the effect that he was slowly driving the truck easterly at the time and place, intending to turn around in the intersection of the two streets and come west again in South Water street; that he did not see deceased as he was moving easterly and was not aware of any front part of his truck having struck any person; and that after he had stopped the truck preparatory to making the turn he looked behind and for the first time saw deceased lying in the street. The testimony of other witnesses disclosed that deceased had received severe injuries on his head or skull, causing death almost immediately. When the witness Woods arrived and examined deceased, then lying in the street, he was dead.

Defendants' counsel first contend that the verdict and judgment are against the manifest weight of the evidence on the questions of the negligence of the driver of the truck and the contributory negligence of the deceased. Under all the facts and circumstances disclosed these questions were peculiarly within the province

of the jury to determine, and we are of the opinion that their verdict on these questions was sufficiently sustained by the evidence, and that the judgment thereon was fully warranted.

It is next contended that the trial court erred in denying defendants' motion in arrest of judgment on the ground that the amended declaration failed to contain an allegation that the present action was commenced within one year after the death of plaintiff's intestate. In our opinion the contention is without merit. It appears that said intestate died on December 13, 1928, and the record discloses that the present action was commenced in less than two months thereafter, viz, on January 30, 1929. In Mangen, Adm'r v. Centennial Laundry Co., 257 Ill. App. 623 (unpublished opinion filed March 17, 1930) the same contention was made, and the first division of this court, in denying it, said: "Where the declaration shows that the accident happened May 25, 1927, and suit was commenced June 21, 1927, sufficient facts appear to disclose affirmatively that the action was brought within one year after death. We hold that the declaration sufficiently stated a cause of action and that any deficiencies in statement therein were cured by verdict."

Equally without merit, in our opinion, is counsels' further contention that the trial court erred in denying defendants' motion in arrest of judgment on the ground that the amended declaration "failed to allege" that the beneficiaries (i.e., the next of kin) of plaintiff's intestate were in the exercise of due care. It does not appear that any of said next of kin were present at the time of the accident or had anything to do with it. The cases cited by counsel are not here applicable.

Finding no reversible error in the record the judgment of the Superior court is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

35596

GENERAL CONTRACT PURCHASE CORPORATION, a corporation,
Defendant in Error,

v.

JOSEPH HAROLD LEVEN,
Plaintiff in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

266 I.A. 610

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out to reverse a judgment against defendant for $2498.83, entered on June 19, 1931, in an action in case. On May 25, 1931, on plaintiff's motion, it appearing that defendant had failed to comply with a prior rule to plead to its declaration, the court ordered that defendant's default be entered. Thereafter, on plaintiff's motion, a jury was called to assess its damages, which they did at the sum of $2498.83, and the court entered the judgment. On June 26, 1931, within the term, defendant filed with the clerk a motion that the judgment be vacated and that a trial be had upon the merits, etc. On the same day two affidavits were filed with the clerk, - one by the defendant and one by defendant's attorney. On July 11, 1931, the cause came on to be heard upon defendant's motion to vacate, and, after arguments of counsel, the court denied it.

No bill of exceptions is contained in the transcript and it does not appear what evidence or affidavits, if any, were presented to the court at or prior to the time of the denial of the motion.

The clerk's transcript further discloses that the action was commenced on June 28, 1929; that the praecipe directed the clerk to issue a summons to defendant "in a plea of trespass on the case;"

256 I.A. 610

that the printed summons referred to the case as being one of "trespass on the case upon promises"; and that plaintiff, in the declaration consisting of one special count and filed June 28, 1929, complained of defendant "of a plea of trespass on the case." The declaration clearly is one in tort. It alleges in substance:

That on November 12, 1925, plaintiff (under its then corporate name, "Illinois Contract Purchase Corporation") entered into a contract with defendant and one Ruben Leven (then engaged in the business of selling household appliances under the name or style of "Household Appliance Shop"); that after the execution of the contract (set out in full in the declaration) defendant alone controlled and transacted all business of the Appliance Shop; that by the contract the Appliance Shop "agreed to sell to plaintiff certain accounts receivable, installment or conditional sales contracts, or other choses in action, evidencing sales of merchandise made in the usual course of business," and for a consideration "further agreed to make collections of accounts and balances remaining due and owing, for and on behalf of plaintiff;" that upon the false representations of defendant, which he knew to be false, plaintiff purchased of defendant certain accounts, installment and conditional sales contracts and other choses in action, and permitted defendant to make collections of the accounts, etc., in its behalf, with the understanding that the collections were to be remitted immediately upon receipt, or were to be placed to plaintiff's credit in a certain bank; that defendant made collections on the accounts, etc., to the total sum of $2498.83, for which he has failed to account to plaintiff; that the collections were made between June 8, 1926 and January 31, 1929, and are of the following items (here is set forth an itemized statement of the collections made and of certain debit and credit items, and showing a net total of $2498.83, belonging to plaintiff); that plaintiff has made repeated demands of defendant for the monies, so totalling the sum of $2498.83, which demands have been refused; and that defendant "has wrongfully, willfully and maliciously converted said monies, rightfully belonging to plaintiff, to his (defendant's) own use," etc.

On August 9, 1929, having entered his appearance by an attorney, defendant filed a general and special demurrer to the declaration. As causes for special demurrer he stated that "the declaration is ambiguous and indefinite;" that "there is a misjoinder of parties;" that "it is apparent from the allegations that plaintiff has no remedy at law;" and that "the suit is for an accounting and should have been filed as such on the chancery side of the court." No further action in the case appears to have been taken until June 7, 1930, when, on plaintiff's motion, the demurrer was called up for

disposition, and, after arguments had thereon, the court overruled the demurrer and entered a rule on defendant to plead to the declaration within 15 days. Defendant did not stand by his demurrer. Nor did he file any plea as ordered, or in fact take any action whatever in the cause for a period of more than one year, or until after the default judgment had been entered against him as first above mentioned.

In defendant's affidavit, filed with the clerk on June 26, 1931, he admitted the execution of the contract between plaintiff and the Appliance Shop, as set forth in the declaration but he did not deny that he personally had collected monies belonging to plaintiff or that he alone controlled and transacted all of the business of the Appliance Shop. Indeed, he stated that "in April, 1927, the store belonging to this affiant and Ruben Leven was robbed," and that "this affiant and Ruben Leven then ceased doing business." He denied that he had made collections to the amount of $2498.83, or in any amount for which he had failed to account to plaintiff, or that he had converted to his own use any monies belonging to plaintiff.

Such portions of the affidavit of defendant's attorney as do not contain conclusions of law relate to the question of his diligence. He alleged in substance that after the demurrer to the declaration had been overruled and the rule to plead had been entered, it was agreed between him and plaintiff's attorney that defendant might plead to the declaration at any time before the cause was set for trial; that the cause, having been stricken from the trial call on April 29, 1931, was, on motion of plaintiff's attorney, put back on the trial calendar on May 5, 1931, and set for hearing on May 25, 1931, contrary to a certain rule of court; that on said May 25, 1931, "the cause did not proceed to hearing, but plaintiff's attorney secured the default order against defendant;" that on June 5, 1931, affiant

default owner obtains judgement" that on June 5, 1937, although
owner did not become [illegible] Plaintiff's attorney became the
owner in the cause for a period of more than one year, he would state
that did he file any plea on behalf, or in fact take any action whatever
declaration within 15 days. Plaintiff did not appeal of the decision.
the demurrer and enters a rule on plaintiff to plead to the
disposition, and, after recommend his decision, the court overruled

appeared, after notice served on plaintiff's attorney, and moved the court that the default order be set aside and defendant be given leave to file four pleas to the declaration, viz: (1) General issue; (2) Statute of Limitations; (3) Judgment Recovered; and (4) Non-Joinder of Parties; that the court continued the motion to the morning of June 19, 1931; that on June 19, 1931, affiant "was ready to proceed" with the hearing of the motion and the trial of the cause, but it "was necessary for him to appear" in certain other courts; that he reached the court room "of this Honorable Court with as much dispatch as possible, arriving there about 11 a. m.;" that he then ascertained that the jury, which had been called to assess the damages, had reached a verdict and was about to sign the same, fixing plaintiff's damages at $2498.83; that he then requested the court to be allowed to be heard on the motion to set aside the default and that there be a new trial on the merits, - stating that he had arrived late in court because of his required attendance in other courts, etc.; and that the court refused the request, received the verdict and entered judgment on the verdict against defendant.

Defendant's counsel first contend that the judgment should be reversed because of non-joinder of parties defendant. It is argued that the record shows that the basis for the action is a written contract between plaintiff on the one hand and defendant and one Ruben Leven as co-partners on the other, and that Ruben Leven was a necessary party. We do not think there is any merit in the contention. The gist of the action is in tort for the unlawful conversion by defendant of monies belonging to plaintiff. "Trover is an action of tort, and it is technically one of the forms of trespass on the case." (21 Ency. Pl. & Pr. p. 1013; Seney v. Knight, 292 Ill. 206, 209.) In 21 R. C. L. p. 468, sec. 34, it is said: "Though tort and contract cannot be joined in the same declaration, yet, where

the gist of the action is tort, the declaration will not be held bad because it alleges that the transaction out of which the tort arose was a contract." In Stevens v. Faucet, 24 Ill. 483, 488, it is decided in substance that trover will lie against one partner, who converts to his own use property which has been entrusted to his firm for manufacture.

Counsel also contend that the court erred in overruling defendant's demurrer to plaintiff's declaration. The argument is that, as the declaration consists of one count and "attempts to charge two distinct causes of action," viz, fraud and deceit and conversion, it stated no cause of action and was demurrable. But it does not appear that defendant elected to stand by his demurrer, and, in our opinion, the declaration sufficiently advised defendant of the charge he was called upon to defend, viz, the unlawful conversion by him to his own use of certain monies claimed to belong to plaintiff.

Counsel further contend that the trial court erred in not allowing defendant's motion to vacate the judgment entered after the previous default had been taken and the damages had been assessed by the jury. This contention is based upon the two affidavits above mentioned, but, as no bill of exceptions is contained in the present transcript, they are not properly before us for consideration. For aught that appears from the transcript, if at the hearing of the motion to vacate the judgment consideration was given to said affidavits, the court may have heard other evidence on the question as to the diligence of defendant or his attorney. But even if the affidavit of defendant's attorney be considered, it clearly appears that he was guilty of negligence, and that the trial court did not abuse its discretion in refusing to vacate the judgment. In Schultz v. Meiselbar, 144 Ill. 26, 28, it is decided that

an affidavit filed on a motion to set aside a judgment by default, although a meritorious defense may be shown, is insufficient if it appears therefrom that the defendant's attorney failed to file a plea in time through "press of business" or inadvertence. In Chapman v. North Amer. Life Ins. Co., 212 Ill. App. 389, 395, it is said: "It has frequently been held that where a motion is made within the term to set aside a default judgment, the action of the trial court in denying the motion will not be reversed on appeal unless it appears that there has been an abuse of discretion, - the rule being that both diligence and merit must be shown."

Finding no reversible error in the record the judgment of the superior court of June 10, 1931, is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

35609

DR. A. M. HEWETT,
Defendant in Error,

vs.

ANNA E. HILL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

266 I.A. 610[3]

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment rendered against her, on March 19, 1931, for $145, following the verdict of a jury, in an action of the 4th class in contract.

The claim of plaintiff, a dentist, is for professional services rendered to defendant at her request between December 20, 1928, and March 6, 1929, on which there had been a payment made of $75, on account, and also certain credits allowed, leaving a balance due of $278. The suit was commenced on August 26, 1929.

In defendant's affidavit of merits, after mentioning the payment of $75, she alleged that the sum, so paid, was more than the services were worth and that she did not owe plaintiff any sum. She also alleged that the dental and bridgework performed by plaintiff for her was unskillfully done.

On the trial plaintiff testified in his own behalf as to the services rendered by him, and he called one witness, who testified as to the taking of an X-ray picture of all of defendant's teeth at her request. Defendant alone testified in her behalf. Both plaintiff and defendant were cross-examined at considerable length.

It is here contended by defendant's counsel in substance that a verbal agreement was made between the parties as to certain specified services to be rendered by plaintiff for a certain fixed price, that these services were not fully performed, and that, hence, plaintiff should not have recovered any sum.

25605

DE. E. K. SMART,
Defendant in Error,

vs.

VARA A. HILL,
Plaintiff in Error.

Error to the Circuit Court of Cook County.

25605

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment rendered against her, on March 28, 1911, for $175, following the verdict of a jury, in an action of the tort brought to enforce

the right of plaintiff, a dentist, to the professional services rendered by her between May 1, 1909, and March 8, 1910, as evidenced by a bill of particulars filed with the declaration. The bill was accompanied by plaintiff's affidavit to the account, and that certain credits allowed, leaving a balance due of $175. The suit was commenced on August 30, 1910.

It defendant's attorneys to notice, under section 2 of practice act of 1907, six alleged that the suit, as brought, was barred by the statute of limitations. Section 16 of said act provides that no action shall be brought after more than five years from the time the cause of action accrued, except in certain specified cases, none of which are claimed to be applicable to the present case.

It is the contention of defendant's counsel in substance that a mutual agreement was made between the parties on the 1st day of March, 1905, by the terms of which plaintiff was to perform certain services for defendant, and that the latter was to pay for the same monthly, at the rate of $5 per month, as the work progressed; that plaintiff continued to perform services under said agreement until the 1st day of March, 1910, when defendant refused to pay for the same; that the cause of action accrued on that day, and that the statute of limitations began to run from that date.

Plaintiff's counsel contend that the agreement was not as claimed by defendant, but that the latter employed plaintiff to perform the services in question, and that the same were to be paid for as the work progressed; that plaintiff performed the services in question, and that defendant refused to pay for the same on March 1, 1910, and that the cause of action accrued on that day.

The only question presented by the record is, when did the cause of action accrue? If it accrued on March 1, 1905, as contended by defendant, then the statute of limitations began to run from that date, and the action was barred when brought, more than five years thereafter. If, however, the cause of action accrued on March 1, 1910, as contended by plaintiff, then the action was brought within the five years, and was not barred by the statute of limitations.

25605

After considering all of the evidence we are of the opinion that it appears from a clear preponderance thereof that the understanding between the parties was that plaintiff was to be paid for his services what they reasonably were worth; that he performed valuable services for defendant in a reasonably skillful manner; that they were reasonably worth (in addition to said payment of $75) the amount of the jury's verdict, $145; and that such particular work as proved unsatisfactory was the result of defendant's insistence that it be done in a certain manner and contrary to plaintiff's advice. We think the jury's verdict is amply sustained by the evidence, and, accordingly, the judgment will be affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

35635

CHARLES E. FOWLER et al.,
Complainants and Appellees,

vs.

HI-LO FAN CORPORATION,
AIRMASTER CORPORATION,
FEDERAL MERCHANDISE CO.,
a Corporation, VICTOR H.
LEINWEBER, CURTIS H. LEINWEBER
and WILLIAM H. LEINWEBER,
Defendants.

VICTOR H., CURTIS H., and
WILLIAM H. LEINWEBER,
Appellants.

99 7

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

266 I.A. 610

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the circuit court, entered June 22, 1931, sustaining the demurrer of complainants to the cross-bill of appellants (the three Leinwebers) and, upon their electing to stand by their demurrer, dismissing said cross-bill for want of equity. About the same time the cause, on the original bill and answer of the three Leinwebers thereto, was referred to a master to take proofs and report his findings and conclusions, and the court denied the motion of said Leinwebers to stay the hearing before the master pending this appeal.

On November 26, 1930, complainants, being a group of six minority stockholders in the Hi-Lo Fan Corporation (a Delaware corporation, licensed to do business in Illinois and having its principal place of business in Chicago) filed a bill on behalf of themselves and such other stockholders as might desire to join in the bill, against the corporation and two of its licensees, and also against the three Leinwebers (hereinafter called the Leinwebers) whom they alleged were officers, directors or stockholders of the corporation and were and had been in complete control of

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Washington, D. C.
No. 26614

CHARLES E. KOPLIN et al.,
Complainants and Appellees,

vs.

HI-LO FAN CORPORATION,
AIRMASTER CORPORATION,
FEDERAL ENGINEERING CO.,
a Corporation, VICTOR K. LEIBOWITZ,
LEIBOWITZ, CURTIS R. LEIBOWITZ
and WILLIAM E. DAVENPORT,
Defendants.

VICTOR K., CURTIS R., and
WILLIAM E. LEIBOWITZ,
Appellants.

MR. PRESIDING JUSTICE VANECKO DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the circuit court, entered June 25, 1959, sustaining the demurrer of complainants to the cross-bill of appellants (the three individuals mentioned, whom their cross-bill is aimed by their demurrer, designating each cross-bill the word of equity. Among the many fine points, on the original bill and answer of the Hi-Lo Corporation thereof, the reference to a master to take proofs and report his findings and conclusions, and the court denied the motion of said intervenors to stay the hearing before the master pending this appeal.

On November 25, 1959, complainants, having a group of the majority stockholders in the Hi-Lo Fan Corporation (a Delaware corporation, licensed to do business in Illinois and having its principal place of business in Chicago) filed a bill on behalf of themselves and many other stockholders as might desire to join in the bill, against the corporation and two of its officers, and also against the three intervenors (hereinafter called the defendants) whose duly elected more than majority of the directors, alleging in substance that the corporation had been in complete control of

of its business affairs. After making allegations of mismanagement of the corporation's affairs and of conspiracy on the part of the Leinwebers to defraud it out of large sums of moneys by diversion of certain royalties, etc., the verified bill prayed (1) that all defendants be required to answer the bill, but not under oath; (2) that the ownership of Letters Patent, No. 1,623,420, be decreed to be in the Hi-Lo Fan Corporation from date of issuance; (3) that the purported owners thereof be decreed to convey it to the corporation; (4) that an account be taken by the court; (5) that all sums of money paid to the Leinwebers under the terms of a certain license agreement, dated May 10, 1928, be decreed to be paid by them to said corporation; (6) that the two other defendant corporations (the licensees) be decreed to pay all future royalties accruing under either of the license agreements to the Hi-Lo Fan Corporation; (7) that the payment of any royalties or profits on account of the license agreement of May 10, 1928, be restrained to abide the result of this suit; (8) that defendant, William H. Leinweber, be decreed to convey to the corporation all inventions or patents in connection with propeller or exhaust fan blades on which he has applied or is about to apply for further Letters Patent; and (9) that complainants may have such other or further relief as equity may require, etc.

On January 5, 1931, the Leinwebers filed their joint and several answer, in which, after denying many of the material allegations of the bill and making numerous allegations, further alleged that complainants were not entitled to the relief prayed or any part thereof. Included in the answer is a so-called "counter-complaint," wherein they mention the service by complainants, shortly prior to the filing of the bill, upon all defendants, of a written demand or notice to rectify within a fixed time certain stated wrongs (substantially those as charged in the bill). And the Leinwebers alleg that those claimed wrongs had never been presented to any regular o

special meeting of the directors, or to any of the officers, of the Hi-Lo Fan Corporation; that complainants have conspired together to destroy the business of the corporation; that in pursuance of the conspiracy they "sent out said malicious notice making unfounded demands and further brought this wholly unfounded suit"; and that "in various other ways" they are "interfering" with the business of the corporation and with its licensees.

On April 3, 1931, the Leinwebers, by leave of court, filed the cross-bill in question in which they made numerous allegations, similar to those contained in their answer to complainant's bill. The prayer of the cross-bill is (1) that complainants be required to answer it, but not under oath; (2) that an accounting be had "to determine the amount of damage done" to cross-complainants, and complainants be decreed to pay whatever sum appears to be due to any of cross-complainants; (3) that complainants and each of them, their agents, attorneys, etc., be restrained "from interfering in any manner whatsoever with said Hi-Lo Fan Corporation, and/or its said licensees", or "with said William H. Leinweber and/or his said licensees", or "with the payment of monies under or in pursuance of said license agreements and/or any of them"; and (4) that cross-complainants have such other and further relief as equity may require, etc.

On April 23, 1931, complainants(as cross-defendants) filed their demurrer to the cross-bill. Among the stated causes of demurrer are (a) that "the matters and things set forth in the cross-bill are each and all available to the cross-complainants, if at all, by answer, and do not form grounds for affirmative relief" against complainants; and (b) that cross-complainants "have not made or stated such a cause as entitles them to any discovery or relief" against complainants. On June 22, 1931, the demurrer came on for hearing before the chancellor and, after argument of

opposing counsel, the court entered the order or decree as first above mentioned.

No motion has here been made by complainants (appellees) to dismiss the appeal upon the theory that the order appealed from is not a final one. In view of the somewhat conflicting holdings of our Supreme court on the question in cases wherein the facts as alleged varied materially, we are in doubt whether or not the present appeal should be dismissed. In the early case of Fleece v. Russell, 13 Ill. 31, it is decided in substance that an order dismissing a cross-bill is interlocutory, and such an order is not subject to review until the whole case is disposed of. The court said (p. 33): "The proceedings upon the original bill in this case are still pending and undisposed of in the circuit court. For aught that appears, the complainant in the cross-bill may yet obtain all the relief to which he is entitled, upon a final disposition of the case in the circuit court; **. A party cannot bring his case here by piecemeal, nor does an appeal or writ of error lie from an interlocutory decree, which is clearly the character of the order sustaining the demurrer to the cross-bill." This holding has been followed in the cases of McMahon v. Quinn, 140 Ill. 199, 201; Village of Harlem v. Suburban R. Co., 202 id. 301, 305; Nelson v. Toluca State Bank, 334 id. 83, 95. But the cases of Grove v. Templin, 320 Ill. 597, 601, and Stelling v. Stelling, 323 id. 122, 126, are to the contrary. In the Grove case (p. 601) it is said: "The record shows that the cross-complainant elected to stand by the amended cross-bill and the court thereupon dismissed the cross-bill. This was a final order which disposed of the appellant's claim, and an appeal from it was properly allowed."

We will, however, consider the question whether the court erred in its ruling here complained of. In Newberry v. Blatchford, 106 Ill. 584, 599, it is said:

appealing counsel, the court entered the order or decree as first above mentioned.

No motion has been made by [illegible] to dismiss the appeal upon the theory that the order appealed from is not a final one. In view of the somewhat conflicting holdings of our Supreme Court on this question [illegible] alleged varied materially, we are in doubt whether or not the present appeal should be dismissed. In the early case of [illegible] v. Russell, 15 Ill. 51, it is decided in substance that an order dismissing a cross-bill is interlocutory, and such an order is not subject to review until the whole case is disposed of. The court said (p. 33): "The proceedings upon the original bill in this case are still pending and undisposed of in the circuit court. For aught that appears, the complainant in the cross-bill may yet obtain all the relief to which he is entitled, upon a final disposition of the case in the circuit court; **. A party cannot bring his case here by piecemeal, nor does an appeal or writ of error lie from an interlocutory decree, which is clearly the character of the order sustaining the demurrer to the cross-bill." This holding has been followed in the cases of [illegible] v. [illegible], 140 Ill. 159, 160; [illegible] v. [illegible] Co., 209 Ill. 301, 303; [illegible] v. [illegible] State Bank, 294 Ill. 23, 25. But the cases of [illegible] v. [illegible], 230 Ill. 307, 312, and Stelling v. Stelling, 255 Ill. 131, 136, are to the contrary. In the Stelling case (p. 136) it is said: "The record shows that the cross-complainant elected to stand by the amended cross-bill and the court thereupon dismissed the cross-bill. This was a final order which disposed of the appellant's rights, and an appeal from it was properly allowed."

We will, however, consider the question whether the court erred in its ruling here complained of. In [illegible] v. [illegible], 106 Ill. 304, 307, it is said:

"It will be seen the cross-bill was filed in violation of the well established chancery practice. A definition of a cross-bill, contemporaneous with its origin, is, it is a mode of defence. One object to be attained by its use is, to discover evidence to defend against that which is alleged against the defendant, and another is to secure affirmative relief not attainable on his answer touching the matters in the original bill. The cross-bill in this case was for no purpose the law permits such a bill to be used. No discovery was sought and no relief was asked that was not attainable, if at all, on his answer. This is stating no new rule of practice. It was decided by this court, as long ago as in Morgan v. Smith, 11 Ill. 194, a defendant will not be permitted to file a cross-bill when his rights are fully disclosed in his answer in response to the allegations of the bill, and might be fully protected by the court on the hearing of the original bill, and the cross-bill of defendant was held to have been properly stricken out of the record, because it was in violation of proper practice."

See, also, the cases of Wing v. Goodman, 75 Ill. 159, 161; Patterson v. Northern Trust Co., 231 id. 22, 26; Thomas v. Thomas, 250 id. 354, 359-60; Roby v. South Park Com'rs, 252 id. 575, 582. In the Wing case it is decided in substance that if the facts alleged in the cross-bill are nothing more than a defense to the case made by the bill, and, if proved, could afford the defendant no affirmative relief, the cross-bill will be obnoxious to a demurrer. In the Thomas case it is said (pp. 359-60): "If a defendant should file a cross-bill when he seeks no discovery and no affirmative relief that he cannot obtain by answer to the original bill, his cross-bill will be dismissed either on answer or motion or demurrer." In the Roby case it is said (p. 582): "It is only where complete justice can not be done on the original bill and answer that a cross-bill is proper."

It will be noticed that in the prayer of the cross-bill in question no discovery is prayed; nor is any affirmative relief prayed, except that the cross-defendants (complainants) be enjoined from interfering in any manner with the defendants in the original bill. The present transcript does not disclose that any application for a preliminary injunction to that effect was made by cross-complainants. If granted it would have operated to prevent the

"It will be seen the cross-bill was filed in violation of the well established chancery practice. A definition of a cross-bill, contradistinguished with its origin, is, it is a sort of defense. One object to be attained by its use is, to discover evidence to defend against that which is claimed against the defendant, and another is to secure affirmative relief not obtainable on the answer touching the matters in the original bill. The cross-bill in this case was for an instance [illegible] to be used. No discovery was sought and no relief was asked that was not attainable, if at all, on his answer. This is nothing new rule or practice. It was decided by this court, as long ago as in Gregory v. Smith, 11 Ill. 199, a defendant will not be permitted to file a cross-bill when his rights are fully disclosed in his answer in response to the allegations of the bill, and might be fully protected by the court on the hearing of the original bill, and the cross-bill of defendants was held to have been properly stricken out of the record, because it was in violation of proper practice."

See, also, the cases of [illegible], 75 Ill. 185, 191; Patterson v. Northern Trust Co., 231 Ill. 94, 98; [illegible], 250 Ill. 584, 589-90; [illegible], 266 Ill. 376, 382. In the [illegible] case it is decided in substance that if the facts alleged in the cross-bill are nothing more than a defense to the case made by the bill, and, if proved, would defeat the complainant of affirmative relief, the cross-bill will be [illegible] to a demurrer. In the [illegible] case it is said (pp. 589-90): "If a defendant should file a cross-bill when he seeks no discovery and no affirmative relief that he cannot obtain by answer to the original bill, his cross-bill will be dismissed either on motion or demurrer." In the [illegible] case it is said (p. 382): "It is only where complete justice can not be done on the original bill and answer that a cross-bill is proper."

It will be noticed that in the prayer of the cross-bill in question no discovery is sought; nor is any affirmative relief prayed, except that the cross-defendants (complainants) be enjoined from interfering in any manner with the defendants to the original bill. The present transcript does not disclose that any application for a preliminary injunction to that effect was made by cross-complainants. If granted it would have operated to prevent the

lawful prosecution of complainants' suit to obtain an accounting and the other relief as prayed against defendants. In other words, the affirmative relief as prayed for amounts to nothing more than an attempt to restrain in the same suit the prosecution of complainants' original bill, which prima facie disclosed that complainants were entitled to equitable relief. Furthermore, after reading the allegations of complainants' bill, defendants' answer thereto and the allegations of the cross-bill, we think it clear that complete justice can be done between the parties upon a hearing under the bill and defendants' answer, and that the cross-bill was unnecessary.

Accordingly, the order or decree of the circuit court of June 22, 1931, appealed from, is affirmed.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

Paper not found, if., Dubois.

Affirmed.

June 23, 1881, concerning fire. Is filed.

Accordingly, the order of dismiss of the circuit court of cross-bill was unnecessary.

a hearing under the bill and to-wit: answer, and that the other exist complete justice can be done between the parties upon their respective rights and the allegations in the cross-bill, as stated after reading the affidavits of complainants' bill, defendants' answer thereto, and the allegations in the cross-bill, as stated complainants were entitled to equitable relief. Furthermore, of complainants' exhibit XIII, which bills charged that

35655

WILLIAM ZIOGAS,
Appellee,

v.

PAUL GEGZNAS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

266 I.A. 610[5]

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 27, 1931, plaintiff commenced a replevin suit against defendant, his stepson, to recover possession of a Buick automobile, of the value of $500, which,he alleged, defendant wrongfully took on April 18, 1931, and thereafter wrongfully detained. The bailiff took the automobile under the writ and delivered it to plaintiff. On September 17, 1931, a trial was had without a jury. Plaintiff was a witness in his own behalf and he introduced in evidence certain writings. Defendant testified and he called as a witness A. A. Slakis, an attorney-at-law. Defendant also introduced in evidence, over plaintiff's objection, a carbon copy of a bill of sale (not signed) of the automobile, which defendant claimed plaintiff had executed on April 15, 1931. The court found the right to the possession of the automobile to be in plaintiff and assessed plaintiff's damages at one cent for defendant's wrongful detention of it, and adjudged that plaintiff have and retain the possession thereof. Defendant appealed.

Plaintiff's testimony is in substance that on June 24, 1929, he purchased the automobile of the Roseland Buick Sales Co., Chicago, at the price of $1520, under a conditional sales contract (introduced in evidence); that at the time of the purchase he made a cash payment of $920, and agreed to pay the balance of $600 in

25628

ATTYS FOR [illegible],
Appellee,

v.

DAVE [illegible],
Appellant.

Appeal from District Court
of [illegible].

25611A. 610

Mr. Justice [illegible] delivered the opinion of the court.

On August 8th, 1921, plaintiff commenced a replevin suit against defendant, his employer, to recover possession of a Buick automobile, of the value of $900, which he alleged defendant wrongfully took on April 10, 1921, and thereafter unlawfully detained. The bailiff took the automobile under the writ and delivered it to plaintiff. On September 17, 1921, a trial was had without a jury. Plaintiff was a witness in his own behalf and he introduced in evidence certain writings. Defendant testified and he called as a witness [illegible]. Defendant also introduced in evidence, over plaintiff's objection, a portion only of a bill of sale (not signed) of the automobile, which statement showed plaintiff had executed on April 13, 1921. The court found the right to the possession of the automobile to be in plaintiff and rendered judgment for plaintiff's damages at one cent for detention, assessed [illegible] interest. Defendant appeals.

Plaintiff's testimony is in substance that on June 6th, [illegible] he purchased the automobile of the Imperial Buick Sales Co., [illegible] for the price of $900, made a conditional bills contract (introduced in evidence) that at the time of the purchase he made a cash payment of $500, and agreed to pay the balance of $410 in [illegible]

monthly payments thereafter - $52 each for 11 months and $28 on the twelfth month; that all of the deferred payments were made when due by postal money orders or express orders (introduced in evidence), which either he or his wife procured; that nothing was due to the Sales Co. on the purchase price; that he was the owner of the automobile; and that he had never sold or transferred it to defendant or anyone else.

Defendant's testimony is in substance that at plaintiff's request he made some of the monthly payments to the Sales Co. out of his own funds; that because of this fact and in order to "protect" him therefor, plaintiff's second wife (defendant's mother) suggested that plaintiff transfer the automobile to the witness by bill of sale; that plaintiff agreed to this and thereafter, on April 15, 1931, signed and delivered such a bill of sale in Slakis' office; that the instrument was mailed to the witness' mother who said she "would keep it," and that the witness "never got it back" from her; that thereafter the witness applied for and obtained in his own name a state vehicle license for the automobile for the year 1931 (introduced in evidence). Defendant's witness, Slakis, testified that he drafted the bill of sale in his office and that plaintiff signed it.

In rebuttal plaintiff testified that defendant never paid, out of his own money or funds, any of the deferred payments to the Sales Co. on the automobile; that he never requested defendant to make such payments; that he never obtained any money from defendant for that purpose; and that he never signed a bill of sale in Slakis' office, or elsewhere, transferring the automobile to defendant.

It was while defendant was on the stand that the purported copy of plaintiff's claimed bill of sale was admitted in evidence, over objection. The court's ruling evidently was based upon a notice, served on plaintiff's attorney just prior to the trial, to the effect

that unless plaintiff produced the original of said bill of sale, secondary evidence of its contents would be introduced. We think that the court's ruling was erroneous in that no proper basis was disclosed for the introduction of secondary evidence of its contents. It clearly appeared from defendant's testimony that the original bill of sale, if any there was, was in the possession of defendant's mother, who was not a party to the suit. Defendant should have made endeavors to bring the original into court by serving a subpoena duces tecum upon Mrs. Ziogas. Defendant, however, made no such attempt, although it appears she was in court during the trial.

But the error of the court in admitting said copy in evidence was not prejudicial to plaintiff, because the court found in plaintiff's favor, and upon the theory (as appears from a statement of the court) that, although the bill of sale was executed, it was not supported by any consideration, inasmuch as the evidence clearly showed that defendant did not out of his own funds pay any of the deferred payments on the conditional sales contract, executed by plaintiff, when the automobile originally was purchased. Defendant's theory on the trial was that said bill of sale had a sufficient consideration to support it because defendant had paid some of those deferred payments. And on the trial there was no evidence of any other consideration for the claimed execution of the bill of sale. And defendant did not contend on the trial that plaintiff had made a gift of the automobile to defendant. No such theory of defense was even suggested.

The main contention of defendant's counsel, here made for the first time, is in substance that plaintiff intended to make a gift of the automobile to defendant, that the bill of sale evidenced a "completed, irrevocable gift," and that no consideration was necessary to support it. Defendant cannot here be allowed to change his theory of defense. Furthermore, there is no evidence

whatever in the record to sustain this new theory of a gift. Indeed, even in the copy of the bill of sale, as introduced in evidence by defendant, it is recited that the sale and transfer of the automobile is made "for and in consideration of the sum of ten ($10) dollars and other good and valuable considerations."

And there is no merit in counsel's further contentions (a) that the finding and judgment are against the weight of the evidence, and (b) that plaintiff should be estopped from claiming ownership and right to possession of the automobile because of the fact that a few days after April 15, 1931, defendant in his own name applied for and obtained a State vehicle license for the automobile for the year 1931. As to the latter contention it appears from plaintiff's testimony that the State licenses for the years 1929 and 1930 were applied for and obtained in plaintiff's name, that plaintiff directed defendant to apply for and obtain the State license for the year 1931 in his (plaintiff's) name, but that there was delay in the making of the application.

Our conclusion is that the judgment appealed from was right and should be affirmed. Such will be the order.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

35275

J. R. VON KESLER & CO., a corporation, (plaintiff),
Appellant,

v.

CHICAGO COLD STORAGE CO., a corporation, and WASHINGTON BERRY GROWERS' PACKING CORP., a corporation, (defendants),
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 611

OPINION UPON REHEARING.

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by plaintiff against the defendants for the recovery of a carload of strawberries valued at $5401.20. At the close of plaintiff's case the court directed the jury to find the issues for the defendants and to assess the defendants' damages at $1. Judgment was entered upon the verdict. To reverse this judgment plaintiff appealed.

The plaintiff's declaration consisted of two counts in the customary form charging in the first the taking and detention of the goods by the defendants, and in the second the detention of the goods. Defendants filed separate pleas of non cepit and non detinet, and each a special plea of property in the Washington Berry Growers' Packing Corporation. Plaintiff filed replications to all the pleas.

The evidence discloses that the plaintiff is a food broker; that the Washington Berry Growers' Packing Corporation (hereinafter referred to as the defendant) is located at Sumner, Washington; that January 27, 1930, plaintiff acted as broker in

1. H. VAN KEUREN & CO.,
a corporation,
(plaintiff),

Appellant,

v.

CHICAGO COIN MACHINE CO.,
a corporation, and KENNETH
MARK MCCANN, MACHINE CORP.,
a corporation,
(defendants),

Appellees.

OPINION UPON REHEARING.

MR. JUSTICE KNOX DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by plaintiff against the defendants for the recovery of a certain of pinball machines valued at $2401.60. At the close of plaintiff's case the court directed the jury to find the issues for the defendants and to assess the defendants' damages at $1. Judgment was entered upon the verdict. To reverse this judgment plaintiff appeals.

The plaintiff's declaration consisted of two counts in the customary form charging in the first the taking and detention of the goods by the defendants, and in the second the detention of the goods. Defendants filed separate pleas of ~~non cepit~~ and ~~non~~ detinet, and each a special plea of property in the Territories to wit the plaea.

The evidence discloses that the plaintiff is a Iowa Novelty Grocery, Vending Corporation. Plaintiff filed replications to the special pleas of property in the Territories, and issue was joined thereon. Thereafter, to wit on January 21, 1930, plaintiff moved in (heretofore referred to as the d-tendant) to locate as counsel, proved that the Commission Novelty Grocery, Vending Corporation

2661A. 611

COMM. COURT COUNTY.

VILLAGE CLERK DECISION

a deal between that defendant and Peter G. Slaughter & Co., a corporation of Chicago, and was instrumental in bringing defendant and Slaughter & Co. together in entering into a contract for the sale of a carload of strawberries, 1930 pack, at 10¢ a pound, and that defendant and Slaughter & Co., did enter into such a contract, signed by defendant and Slaughter & Co.

Sometime after May 5, 1930, and before July 17, 1930, the plaintiff notified the defendant to ship the strawberries to plaintiff and to draw on it for the amount of the shipment; accordingly the strawberries were consigned to plaintiff and July 17, 1930, a sight draft for $5401.20 was drawn on plaintiff and paid by it July 22, 1930, plaintiff receiving the bill of lading which it delivered to the Chicago Cold Storage Co., with a request that the strawberries be stored for the plaintiff's account. July 23, 1930, defendant wrote plaintiff it had diverted the strawberries and had instructed the Chicago Cold Storage Co., not to make delivery of the strawberries other than against its order. The following day the Chicago Cold Storage Co., (whose only interest in this litigation is that the strawberries were stored with it) informed plaintiff that if it wanted the strawberries it would have to replevy them, and this suit followed. The sum of $5401.20 paid by plaintiff to defendant has never been repaid to plaintiff.

It further appears from the evidence that May 5, 1930, Peter G. Slaughter, president of Peter G. Slaughter & Co., and Joseph R. Von Kesler, president of plaintiff, had a conversation and when Von Kesler was about to relate this conversation, defendant's counsel objected, and it was sustained. Thereupon the plaintiff offered to prove that in that conversation Slaughter said he did not want to take the strawberries and wished to cancel the contract; that Von Kesler replied he did not wish to ask the defendant

a deal between that defendant and Peter G. Slaughter & Co., a corporation of Chicago, and was instrumental in bringing defendant and Slaughter & Co. together in entering into a contract for the sale of a carload of strawberries, 1000 pack, at 10¢ a pound, and that defendant and Slaughter & Co., did enter into such a contract, signed by defendant and Slaughter & Co.

Sometime after May 2, 1920, and before July 17, 1920, the plaintiff modified the defendant to ship the strawberries to plaintiff and to draw on it for the amount of the purchase; according-ly the strawberries were consigned to plaintiff and July 17, 1920, a sight draft for $2641.80 was drawn on plaintiff and paid by it July 22, 1920, plaintiff receiving the bill of lading which it delivered to the Chicago Cold Storage Co., with a request that the strawberries be stored for the plaintiff's account. July 23, 1920, defendant wrote plaintiff it had diverted the strawberries and had instructed the Chicago Cold Storage Co., not to make delivery of the strawberries other than explained its order. The following day the Chicago Cold Storage Co., (whose only interest in this litigation is that the strawberries were stored with it) informed plaintiff that it wanted the strawberries it would have to replay them, and this suit followed. The sum of $2401.80 paid by plaintiff to defend-ant has never been repaid to plaintiff.

It further appears from the evidence that May 5, 1920, Peter G. Slaughter, president of Peter G. Slaughter & Co., and Joseph F. Von Kaufer, president of plaintiff, had a conversation and when Von Kaufer was about to relate this conversation, defend-ant's counsel objected, and it was sustained. Thereupon the plain-tiff offered to prove that in that conversation Slaughter said he did not want to take the strawberries and wished to cancel the con-tract; that Von Kaufer replied he did not wish to put the defendant

to cancel the contract, and if it was agreeable to Slaughter he would take the strawberries off his hands, and that Slaughter said that would be all right. To which offer the court sustained defendant's objection. It further appears that plaintiff had not notified defendant that it had agreed to take the strawberries off Slaughter & Co.'s hands until July 22, 1930, which was five or six days after the strawberries had been shipped to plaintiff. It was on this state of the record that the trial court instructed the jury to find for the defendant.

There is no claim in the instant case that the contract between the defendant and Slaughter & Co. for the sale and purchase of the strawberries was not bona fide, or that the plaintiff at any time prior to May 5, 1930, had any expectation of becoming the owner of the strawberries, or that plaintiff was guilty of any fraud, but what the defendant contends is that on May 5, 1930, the date of the conversation between the plaintiff and Slaughter, plaintiff was still the agent of the defendant and that it could not substitute itself in place of the purchaser without the consent of the principal; in other words, the defendant invoked the familiar doctrine that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency without the consent of his principal freely given, after full knowledge of every matter known to his agent which might affect the principal, as announced in Tyler v. Sanborn, 128 Ill. 136. In the instant case the plaintiff, so far as the evidence discloses, was authorized merely to solicit offers to buy to be submitted to the defendant. When the plaintiff obtained the signature of Slaughter & Co. to the contract of purchase its work was ended. Nowhere in the record is there any evidence tending to show plaintiff owed defendant any further duty. We have carefully examined the record and from

any further duty." We have carefully examined the record and find record in these any evidence tending to show plaintiff owed defendant & Co. to the contract of purchase its work was making. Because in the the defendant. When the plaintiff obtained the signature of Slaughter was authorized merely to solicit offers to buy to be submitted to the instant case the plaintiff, so far as the evidence discloses, the principal, as announced in Kyle v. Kavanagh, 129 Ill. 394. In full knowledge of every matter known to his agent which might affect his agency without the consent of his principal freely given, after made of the property of his principal which is within the scope of agent cannot, either directly or indirectly, have an interest in the other words, the defendant invoked the familiar doctrine that an in place of the purchaser without the consent of the principal; in the agent of the defendant and that it could not substitute itself conversation between the plaintiff and Slaughter, plaintiff was still what the defendant contends is that on May 5, 1920, the date of the of the stockyards, or that plaintiff was guilty of any fraud, but time prior to May 5, 1920, had any explanation of becoming the agent between the defendant and Slaughter & Co. for the sale and purchase of the stockyards was not known fully, as that the plaintiff at any

There is no claim in the record that the contract

duty to find for the defendant.

on this state of the record that the trial court instructed the days after the stockyards had been shipped to plaintiff. In the Slaughter & Co.'s hands until July 22, 1920, which was five or six modified defendant's that it had agreed to take the stockyards all defendant's objection. It further appears that plaintiff had not that would be all right. In which after the agent mentioned

to cancel the contract, and if it was agreeable to Slaughter he would take the stockyards off his hands, and that Slaughter said

it we are not willing to concede that it can be said that the plaintiff was the agent of the defendant on May 5, 1930.

We have given mature consideration to the arguments advanced by defendant, including its petition for rehearing, but are still of the opinion that under the facts as shown in the record the court erred in excluding the conversation and that the rule contended for by the defendant is not applicable, as an agent is only prohibited from dealing with his principal's property for his own benefit so long as the agency continues, and as soon as the agency ceases, he occupies the same relation to the property that a stranger to the property does, and acting in good faith may become the owner of the property to be purchased or otherwise (Munn et al. v. Burges et al., 70 Ill. 604), and an agent who has fully discharged his trust in selling his principal's property to a third person in good faith, having no interest in the same at the time, may afterwards acquire the title from the purchaser (Walker v. Carrington et al., 74 Ill. 446), and the fact that the plaintiff had not advised defendant that it had assumed Slaughter & Co.'s liability and taken over the contract could not affect any right acquired by it under the agreement. (Robertson v. Chapman, 152 U. S. 673.)

In the instant case the defendant received $5401.20, the amount for which the strawberries were sold; defendant has not offered to return the $5401.20, and now claims it is also entitled to the strawberries. Such an argument shocks our sense of justice. It should not under the circumstances as shown in the instant case be permitted to prevail. Furthermore, it can be said that by retaining the $5401.20 they ratified the conduct of the plaintiff in purchasing the strawberries from Slaughter & Co.

Plaintiff has assigned and argued other grounds why the

Plaintiff has assigned and argued before Grundig the

stamperries from Langfaer & Co.

By contract, including the position for warranties, and the right of the opinion that under the facts as shown in the record the court erred in excluding the conversation and that the rule contended for by the defendant is not applicable, as an agent is only prohibited from dealing with his principal's property for his own benefit or in the agency contemplated, and as soon as the agency ceases, he occupies the same relation to the property that a stranger to the property does, and nothing in good faith may become the owner of the property to be purchased or otherwise (Mann et al. v. Lumber et al., 70 III. 604), and an agent who has fully discharged his trust in selling his principal's property to a third person in good faith, having no interest in the same at the time, may subsequently acquire the title from the purchaser (Walker v. Carrington et al., 74 III. 440), and the fact that the plaintiff had not received returned that it had assumed Klingsor & Co.'s liability and taken over the contract could not affect any rights acquired by it under the agreement. (Sparrow v. Bowman, 182 N. Y. 472.)

In the instant case the defendant received [illegible], the amount for which the stamperies were sold; defendant has not offered to return the [illegible], and now claims it is also entitled to the stamperies. Such an statement shocks our sense of justice. It should not under the circumstances be shown in the instant suit by permitted to prevail. Furthermore, it can be said that by retaining the [illegible] they ratified the contract of the plaintiff in purchasing the

Plaintiff has assigned and argued before Grundig the

stamperies from Langfaer & Co.

By contract, including the position for warranties, and the right of the opinion that under the facts as shown in the record the court erred in excluding the conversation and that the rule contended for by the defendant is not applicable, as an agent is only prohibited from dealing with his principal's property for his own benefit or in the agency contemplated, and as soon as the agency ceases, he occupies the same relation to the property that a stranger to the property does, and nothing in good faith may become the owner of the property to be purchased or otherwise (Mann et al. v. Lumber et al., 70 III. 604), and an agent who has fully discharged his trust in selling his principal's property to a third person in good faith, having no interest in the same at the time, may subsequently acquire the title from the purchaser (Walker v. Carrington et al., 74 III. 440), and the fact that the plaintiff had not received returned that it had assumed Klingsor & Co.'s liability and taken over the contract could not affect any rights acquired by it under the agreement. (Sparrow v. Bowman, 182 N. Y. 472.)

In the instant case the defendant received [illegible], the amount for which the stamperies were sold; defendant has not offered to return the [illegible], and now claims it is also entitled to the stamperies. Such an statement shocks our sense of justice. It should not under the circumstances be shown in the instant suit by permitted to prevail. Furthermore, it can be said that by retaining the [illegible] they ratified the contract of the plaintiff in purchasing the

judgment should be reversed, but in the view we take of the instant case it will not be necessary to discuss them.

For the reasons indicated the judgment of the Superior court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

judgment should be reversed, but in the view we take of the instant case it will not be necessary to discuss them.

For the reasons indicated the judgment of the Supreme Court is reversed and the cause remanded for a new trial.

It is so ordered.

Article 7, 1., and Section 1., Doctor,

35275

J. R. VON KAMLER & CO., a corporation, (plaintiff), Appellant,

v.

CHICAGO COLD STORAGE CO., a corporation, and WASHINGTON BERRY GROWERS' PACKING CORP., a corporation, (defendants), Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 611[1A]

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by plaintiff against the defendants for the recovery of a carload of strawberries, valued at $5401.20. At the close of plaintiff's case the court directed the jury to find the issues for the defendants and to assess the defendants' damages at $1. Judgment was entered upon the verdict. To reverse this judgment plaintiff appealed.

The plaintiff's declaration consisted of two counts in the customary form, charging in the first the taking and detention of the goods by the defendants, and in the second the detention of the goods. Defendants filed separate pleas of non cepit and non detinet, and each a special plea of property in the Washington Berry Growers' Packing Corporation. Plaintiff filed replications to all the pleas.

The evidence discloses that the plaintiff is a food broker; that the Washington Berry Growers' Packing Corporation, (hereafter referred to as the defendant) is located at Sumner, Washington; that on January 27, 1930, plaintiff acted as broker in a deal between the defendant and Peter G. Slaughter & Co., a corporation of Chicago, and was instrumental in bringing the

36276

J. A. VON [illegible] & CO.,
a corporation,
(plaintiff),
Appellant,

v.

CHICAGO [illegible] STORAGE CO.,
a corporation, and WASHINGTON
BERRY GROWERS' PACKING CORP.,
a corporation, (defendants),
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

266 I.A. 611

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by plaintiff against the defendants for the recovery of a carload of strawberries, valued at $5461.20. At the close of plaintiff's case the court directed the jury to find the issues for the defendants and to assess the defendants' damages at $1. Judgment was entered upon the verdict. To reverse this judgment plaintiff appeals.

The plaintiff's declaration consisted of two counts in the customary form, charging in the first the taking and detention of the goods by the defendants, and in the second the detention of the goods. Defendants filed separate pleas of non cepit and non detinet, and each a special plea of property in the Washington Berry Growers' Packing Corporation. Plaintiff filed replications to all the pleas.

The evidence discloses that the plaintiff is a food broker; that the Washington Berry Growers' Packing Corporation, (hereafter referred to as the defendant) is located at Sumner, Washington; that on January 27, 1930, plaintiff acted as broker in a deal between the defendant and Peter G. [illegible] & Co., a corporation of Chicago, and was instrumental in bringing the

defendant and Slaughter & Co., together in entering into a contract for the sale of a carload of strawberries, 1930 pack, at 10¢ a pound, and that the defendant and Slaughter & Co. did enter into such a contract, signed by the defendant and Slaughter & Co.

Sometime after May 5, 1930, and before July 17, 1930, the plaintiff notified the defendant to ship the strawberries to plaintiff and draw on it for the amount of the shipment; accordingly the strawberries were consigned to plaintiff and on July 17, 1930, a sight draft for $5401.20 was drawn on plaintiff and paid July 22, 1930, plaintiff receiving the bill of lading which it delivered to the Chicago Cold Storage Co., with a request that the strawberries be stored for the plaintiff's account. On July 23, 1930, defendant wrote plaintiff it had diverted the strawberries and had instructed the Chicago Cold Storage Co., not to make delivery of the strawberries other than against its orders. The following day the Chicago Cold Storage Co., (whose only interest in this litigation is that the strawberries were stored with it) informed plaintiff that if it wanted the strawberries it would have to replevy them, and this suit followed. The sum of $5401.20 paid by plaintiff to defendant has never been repaid plaintiff.

It further appears from the evidence that on May 5, 1930, Peter G. Slaughter, president of Peter G. Slaughter & Co., and Joseph R. Von Kesler, president of plaintiff, had a conversation and when Von Kesler was about to relate this conversation, defendant's counsel objected, and it was sustained. Thereupon the plaintiff offered to prove that in that conversation Slaughter said he did not want to take the strawberries, and wished to cancel the contract; that Von Kesler replied he did not wish to ask the defendant to cancel the contract, and if it was agreeable to Slaughter he would take the strawberries off of his hands, and that Slaughter said that

would be all right. To which offer the court sustained defendant's objection. It further appears that plaintiff had not notified defendant that it had agreed to take the strawberries off of Slaughter & Company's hands until July 22, 1930, which was five or six days after the strawberries had been shipped to plaintiff. It was on this state of the record that the trial court instructed the jury to find for the defendant.

In the trial court, as here, defendant contended that it appearing the strawberries were sold to Slaughter & Company on January 27, 1930, by defendant's agent, the agent could not substitute itself in place of the purchaser without the consent of the principal, the defendant; in other words, the defendant invoked the familiar doctrine that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal, as announced in Tyler v. Sanborn, 128 Ill. 136. We have no quarrel with that rule of law. In the instant case there is no claim on the part of the defendant that the contract between the defendant and Slaughter & Co. for the sale and purchase of the strawberries was not bona fide, or that the plaintiff at any time prior to May 5, 1930, had any expectation of becoming the owner of the strawberries that Slaughter & Co. had purchased of the defendant, or that plaintiff was guilty of any fraud. Under such a state of facts as shown in the instant case we are of the opinion the court erred in excluding the conversation and that the rule contended for by the defendant is not applicable, as an agent is only prohibited from dealing with his principal's property for his own benefit so long as the agency continues, and as soon as the agency ceases, he occupies the same

would be all right. To point after the court sustains defend-
ant's objection. It further appears that plaintiff had not
notified defendant that it had decided to take the conveyance
off of Chandler & Company's hands until July 27, 1920, which was
five or six days after the conveyance had been shipped to plain-
tiff. It was on this state of the record that the trial court
instructed the jury to find for the defendant.

In the trial court, as here, defendant contended that
it appeared the conveyances were void to Chandler & Company
on January 27, 1920, by defendant's claim, the court could not
substitute itself in place of the purchaser without the consent
of the principal, the defendant in other words, the defendant
invoked the familiar doctrine that an agent cannot, either directly
or indirectly, have an interest in the sale of the property of his
principal which is within the scope of his agency, without the
consent of his principal. Treely Clark, also well known as
every matter known to the agent which might affect the principal,
as announced in Tyler v. Hamblin, 148 Ill. 130. We have no general
rule that rule of law. In the instant case there is no claim on the
part of the defendant that the contract between the defendant and
Chandler & Co. for the sale and purchase of the conveyances via
Mare Line, or that the plaintiff at any time prior to May 8,
1920, had any suspicion of becoming the owner of the conveyances
that Chandler & Co. had purchased of the defendant, or that plain-
tiff was guilty of any fraud. Under such a state of facts as above
in the instant case or are of the opinion the court erred in sustain-
ing the demurrer and that the rule announced for by the defendant
is not applicable, as an agent is only prohibited from profiting
personally in matters connected with his agency. We examine the cases
cited and by each on the agency screen. We examine the case

relation to the property that a stranger to the property does, and acting in good faith may become the owner of the property by purchase or otherwise (Munn v. Burgess, 70 Ill. 604), and an agent who has fully discharged his trust in selling his principal's property to a third person in good faith, having no interest in the same at the time, may afterwards acquire the title from the purchaser (Walker v. Carrington, 74 Ill. 446), and the fact that plaintiff had not advised defendant that it had assumed Slaughter & Company's liability and taken over the contract could not affect any right acquired by it under that agreement. (Robertson v. Chapman, 152 U. S. 671.)

Plaintiff has assigned and argued other grounds why the judgment should be reversed, but in the view we take of the instant case it will not be necessary to discuss them.

For the reasons indicted the judgment of the Superior court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

35350

1027

OTTO G. RAEMISCH,
Defendant in Error,

v.

JAMES ASKOUNIS et al.,
(defendants),

T. GEORGE GANIOS,
Plaintiff in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

266 I.A. 611

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

December 19, 1925, defendant in error, Otto G. Raemisch, recovered a judgment on the verdict of the jury against James Askounis and T. George Ganios for $2500 in an action on the case for fraud and deceit. November 3, 1930, a writ of capias ad satisfaciendum was issued directing the sheriff of Cook county to arrest the plaintiff in error, T. George Ganios, and commit him to jail. June 27, 1931, plaintiff in error's motion to quash the writ was denied and this writ of error is prosecuted to review the same. The defendant in error has not appeared or filed a brief in this court.

The record discloses that after the entry of the judgment and on January 25, 1926, a writ of execution was issued against James Askounis and T. George Ganios, and by the sheriff returned "no part satisfied." April 5, 1926, a writ of capias ad satisfaciendum was issued against the bodies of James Askounis and T. George Ganios, doing business as Burlington Restaurant, and James Askounis was arrested and committed to the county jail. June 19, 1926, he was released and the writ returned "satisfied for $50.50 and unsatisfied as to the balance." The plaintiff in error was not at that time taken into custody. November 3, 1930, another writ of capias ad satisfaciendum

CLYDE O. KENNISON,	
Defendant in error,	
v.	
JAMES JACKSON et al.,	
(Defendants),	
T. BRUCE GAYNOR,	
Plaintiff in error.	

Error from Clerk's Office.

Error to Juvenile Court.

Mr. JUSTICE ELDRIDGE DELIVERED THE OPINION OF THE COURT.

December 19, 1922, defendant in error, Clyde O. Kennison, recovered a judgment on the verdict of the jury against James Jackson and T. George Gaynor for $2500 in an action on the case for fraud and deceit. September 7, 1923, a writ of error and supersedeas was issued directing the sheriff of Cook county to arrest the plaintiff in error, T. George Gaynor, and commit him in jail. June 27, 1923, plaintiff in error's motion to quash the writ was denied and time with of error is prosecute in twelve life terms. The defendant in error has not appeared or filed a brief in this court.

The record discloses that after the entry of the judgment and on January 15, 1923, a writ of execution was issued against James Jackson and T. George Gaynor, and by the sheriff returned "no part satisfied." April 5, 1923, a writ of capias ad satisfaciendum was issued against the bodies of James Jackson and T. George Gaynor, doing business as Purification Department, and James Jackson was arrested and committed to the county jail. June 19, 1923, he was released and the writ returned "satisfied for $50.00 and committed as to the balance." The plaintiff in error was not at that time taken into custody. November 3, 1923, another writ of capias ad satisfaciendum

was issued by the clerk of the Superior court, commanding the sheriff of Cook county to take the plaintiff in error, impleaded with James Askounis, and keep him safely, to satisfy defendant in error in the sum of $2500, which defendant in error lately in the Superior court of Cook county, at a term thereof begun and held in said Cook county on the first Monday of December, 1925, recovered against said plaintiff in error, etc. May 15, 1931, plaintiff in error filed his petition and moved the court to quash the said capias ad satisfaciendum, on the ground that said writ was void, which motion was overruled.

The judgment entered December 19, 1925, is against James Askounis and T. George Ganios. The writ of capias ad satisfaciendum issued November 3, 1930, is against the plaintiff in error and not James Askounis. As a general rule, a ca. sa. must strictly follow the judgment, and be warranted by it; otherwise it is void. The capias which issues to enforce a joint judgment must be as broad as the judgment, and embrace all the defendants. Thus a separate ca. sa. against one defendant on a joint judgment against two cannot be supported. And this is so, even after the other defendant has been discharged. (8 Ency. Pl. and Pr. 632.) The execution must follow the judgment and must on its face appear to be against all the defendants against whom the judgment is entered, notwithstanding from the death, bankruptcy or some other cause, no levy can be made on the property of some. Executions ought also to state the name of each defendant as it is set forth in the judgment. (Clarke v. Kemp, 211 Ill. App. 206.) It must follow the judgment in every essential particular. (Hobson v. McCambridge, 130 Ill. 367; Block v. Hooper, 318 id. 182, 185; Farmer & Mechanics National Bank v. Crane, 15 Abbott 434.

The party who seeks to avail himself of the power of the

The party who seeks to avail himself of the power of the

court to enforce the payment of money, by imprisonment, should be required to pursue strictly the law conferring authority for such proceedings.

For the reasons above stated, we are of the opinion the court erred in denying plaintiff in error's motion to quash the writ and consequently the order of the court denying said motion is reversed and the cause is remanded with directions to quash the writ of capias ad satisfaciendum.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

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35425

R. L. GEASLEN et al.,
(complainants),
Appellants,

v.

OLIVER SALINGER & CO.,
a corporation, et al.,
(defendants),
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

266 I.A. 611

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

April 22, 1929, complainants filed their bill against Oliver Salinger, Oliver Salinger & Company, a corporation, and State Bank of Chicago, trustee, wherein they sought to have a certain contract for the purchase of two lots cancelled and declared null and void for fraud, and to compel a repayment of $2854.81. The chancellor heard the evidence and on April 22, 1931, entered a decree denying the prayer of the bill and dismissed the cause for want of equity. To reverse this decree complainants appealed.

The bill was filed April 22, 1929. In complainants' amended bill filed March 29, 1930, it is alleged inter alia that April 14, 1924, they were approached by one Doane, an agent of Oliver Salinger & Co., relative to the purchase of a piece of real estate in a subdivision known as "Oliver Salinger & Co.'s Proposed Eighth Kimball Boulevard Addition to Edgewater;" April 21, 1924, said Doane transported complainants to said subdivision and introduced them to one R. I. Joyce, another agent of Oliver Salinger & Co., authorized to sell real estate in said subdivision; that defendants by their agents Doane and Joyce, then and there exhibited to said complainants a certain plat and represented that said plat

35458

R. L. GRAGLEY et al.,
(complainants),
Appellants,

v.

OLIVER SALINGER & CO.,
a corporation, et al.,
(defendants),
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

266 I.A. 611

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

April 22, 1929, complainants filed their bill against Oliver Salinger, Oliver Salinger & Company, a corporation, and State Bank of Chicago, trustee, wherein they sought to have a certain contract for the purchase of two lots cancelled and declared null and void for fraud, and to compel a repayment of $2364.81. The chancellor heard the evidence and on April 20, 1931, entered a decree denying the prayer of the bill and dismissed the cause for want of equity. To reverse this decree complainants appealed.

The bill was filed April 22, 1929. In complainants' amended bill filed March 25, 1930, it is alleged inter alia that April 14, 1924, they were approached by one Deane, an agent of Oliver Salinger & Co., relative to the purchase of a piece of real estate in a subdivision known as "Oliver Salinger & Co.'s Proposed [illegible] Kimball [illegible] Subdivision to [illegible]"; April 21, 1924, said Deane transported complainants to said subdivision and introduced them to one H. L. Joyce, another agent of Oliver Salinger & Co., authorized to sell real estate in said subdivision; that defendants by their agents Deane and Joyce, then and there exhibited to said complainants a certain plat and represented that said plat

was a true and correct plat of said subdivision and that it contained the true location of the subdivision with reference to the streets shown thereon; that said defendants by their agents did then and there point out to the complainants in said plat two lots which appeared in said plat as fronting on Kedzie avenue and solicited complainants to buy same, and further represented said lots were business lots; that Kedzie avenue was one of the finest business streets in the City of Chicago; that said lots were located on Kedzie avenue at a point which was very desirable as a business location; that the State Bank of Chicago, a large and well-known corporation, was interested in the property and was back of it and that any real estate backed by said corporation was a good business proposition and absolutely sound and as represented; that relying upon the truth of said representations they did on April 21, 1924, execute a contract for the purchase of said two lots for $5000, payable $1400 on the execution thereof and the balance in monthly installments of $70 each; that each and every one of said representations were false and fraudulent and were known to defendants to be false and fraudulent and were made with the fraudulent intent of obtaining the signatures of complainants to said contract and of obtaining their money and with the intent to cheat and defraud them; that complainants believed said representations to be true and in good faith relied upon the truth of each of them; that up to the month of May, 1926, the total amount paid by them upon said contract amounts to $2854.81, and that they would not have made such payments except in reliance upon the truth of said representations.

The bill further alleged that knowledge of the falsity of the said representations did not come to their attention until about the middle of 1926; that July 1, 1926, they notified Oliver Salinger & Co., that they have elected to cancel and rescind the contract because

of the falsity of said representations, and offered to return the contract and requested the defendants to repay all moneys paid; that negotiations were then carried on for many months between Oliver Salinger & Co., and complainants in order to arrive at some agreement, but failing to agree, on December 29, 1926, complainants received a notice of forfeiture of said contract; that complainants then took the matter up with their lawyer, who since that time has been negotiating with the defendants; that April 20, 1929, complainants served upon defendants a written notice rescinding said contract and demanding the refund of all moneys paid.

The bill further alleged that a plat of the subdivision was not placed of record until June 11, 1924; that at the time of the execution of said contract there was in existence no such legal subdivision and that said contract was entered into in violation of section 29 ch. 109, Smith-Hurd Statute, 1927. The defendants filed separate answers. In the answer of the defendant Oliver Salinger, after denying all charges of fraud it was averred that complainants never for about four years after the execution of the contract made any objection thereto, but repeatedly asked defendants to extend the time for making payments, claiming they were financially unable to keep up said payments.

The undisputed facts are that in October, 1923, Oliver Salinger purchased certain land south of Peterson avenue and just west of the North Shore Sanitary District channel in Chicago and made a subdivision, which is known as Oliver Salinger & Company's Kimball Boulevard Addition. In this subdivision the street running parallel to and immediately west of the North Shore Sanitary District channel was laid out and named Kedzie avenue, running from Thorndale avenue on the south to Peterson avenue on the north. About November 16, 1923, he also made arrangements for the subdivision and sale of the land

of the family of said respondents, and attempt to secure the
consent and recognition the defendants to repay all moneys paid that
negotiations were then carried on for many months between Oliver
Palmer & Co., and complainants in order to secure at some deter-
ment, but failing to agree, on December 9th, 1922, complainants re-
ceived a notice of forfeiture of said contract but complainants then
took the matter up with their lawyer, the since that time Oliver
negotiating with the defendants; that April 30, 1923, complainants
served upon defendants a written notice requesting said contract and
demanding the refund of all moneys paid.

The bill further alleged that a plat of the subdivision
was not placed of record until June 11, 1923; that at the time of
the execution of said contract there was no existing No such legal
subdivision and that said contract was entered into in violation of
section 5b ch. 109, Smith-Hurd Statute, 1923. The defendants filed
demurrer answers. In the answer of the defendant Oliver Palmer,
after denying all charges of fraud it was averred that complainants
never for about four years after the execution of the contract made
any objection thereto, but repeatedly asked extensions of time
time for making payments, claiming they were financially unable to
keep up said payments.

The undisputed facts are that in October, 1921, Oliver
Palmer purchased certain land south of Fifty-sixth avenue and just west
of the North Pure Sanitary District channel in Cicero and made a
subdivision, which is known as Oliver Palmer & Company's Elmwood
Heights addition. In this subdivision the street running parallel
to and immediately west of the North Pure Sanitary District channel
was left out and named Berwin avenue, running from Thirty-seventh
on the south to Peterson avenue on the north. Under date of
Mrs Ida Cook executed her contract

immediately to the north of Peterson avenue and west of the North Shore Sanitary District channel and Lincoln avenue. This land was owned by William A. Peterson, who conducted a nursery thereon. A. I. Silander, the same surveyor who made the subdivision to the south of Peterson avenue, made a plat of the proposed subdivision of this land immediately north of Peterson avenue and named it Oliver Salinger & Company's Eighth Kimball Boulevard Addition to North Edgewater. The lots involved in the instant case are in this subdivision. The surveyor's certificate to this subdivision is dated April 7, 1924, and in the plat appears a street which is a continuation of Kedzie avenue south of Peterson avenue. That street in this plat, which was intended for record, was originally labeled "N. Kedzie Av." April 10, 1924, this plat was submitted to John D. Riley, the examiner of subdivisions of the City of Chicago, who had charge of approving plats for the city, for his approval. He advised Salinger that this continuation of Kedzie avenue could not be called Kedzie avenue, and while under advisement by Mr. Riley the plat was changed by Silander, the surveyor, to read "N. Kedzie Av. extented N." Copies of these plats were made and were known as "show plats." These "show plats" showed all the Salinger subdivisions, - there being in all eight subdivisions. Upon this "show plat", among other information, appears the following: "Lots fronting Devon Av. Lincoln Av. Kedzie Av. and Peterson Av. may be used wholly or in part for Business Purposes." (No question arises as to whether the lots involved may not be used for business purposes.) This "show plat" indicates that the two lots involved are located on the west side of a street designated as "N. Kedzie Av. extented N.," 52 feet south of Glenlake avenue; the first street to the south being Peterson avenue. This plat submitted to the examiner of subdivisions on April 10, 1924, was finally approved by the examiner of subdivisions on June 6, 1924, and was recorded in the

office of the Recorder of Deeds of Cook County, Illinois, on June 11, 1924, and as approved and recorded, the location and size of the lots are identical with the "show plat", the only change made in the plat being that the street designated in the "show plat" as "N. Kedzie Av."extented N." appears as "Jersey avenue."

To prove the fraud charged complainants offered themselves as witnesses.

Esther Geaslen testified that one Doane called at her office and told her Oliver Salinger & Company, for whom he was sales manager, had a piece of property for sale. He left a plat (one of the "show plats" before mentioned) and made arrangements to take her and her husband out to the property. The following Sunday, April 21, 1924, he took them to the property, and while there he said he would like to interest them in two particular lots on Kedzie avenue, placing a dot on the map indicating the two lots involved in the instant proceeding. They went over the lots and while on the property she inquired if it was a correct map and was told it was. During this conversation Doane said, "It was a good business street. You know what Kedzie avenue is. Look at Kedzie and Lawrence and Kedzie and Madison," and she asked, "Has this got the possibilities of Kedzie and Madison, of Kedzie and Lawrence?" and was told that it had. After this conversation they were introduced to a Mr. Joyce, who said he was a department manager. Joyce went into the office and brought the contract, which they signed. The contract is dated April 21, 1924, and in and by it complainants agreed to purchase lots 3 and 4, in Block 2 in Oliver Salinger & Company's Proposed Eighth Kimball Boulevard Addition to North Edgewater, etc., and for which they agreed to pay $5,000, $1,400 on the execution of the contract and $70 on the 21st day of each month thereafter, the entire balance to be paid within four years. The lots are the identical lots shown them by Doane.

She further testified that she signed the contract believing and relying upon the statements made by Doane, and made a deposit of $100; and thereafter up to July 7, 1924, she made various payments on account of said contract which totaled the $1,400 mentioned in the contract. In June, 1926, while at the office of Salinger & Company she was told by a Mrs. Flynn, secretary of that company, that the street on which the lots were located was Jersey avenue and not Kedzie avenue; that this was the first knowledge she had that the street was named Jersey avenue; that the total amount paid by them amounted to $2,854.81; that thereafter she made no further payments. On cross examination she testified that both Doane and Joyce told her that the lots were on Kedzie avenue; that before she visited the premises she looked at the "show plat" two or three times and noticed the words on what purports to be the street in front of the lots, "N. Kedzie Av. extented N.;" that she knew the word "extented" meant "extended;" and that she knew it was a new subdivision.

Richard L. Geaslen testified that Doane told him he had a couple of lots on Kedzie avenue he would like to interest them in and showed them a little chart and said there were only two left on Kedzie avenue; that they went over and looked at the property; that Doane showed them these two lots on Kedzie avenue; that they talked about the future of Kedzie avenue while standing on the lots in question. On cross examination he testified that he was experienced in reading plans and blue prints and knew that "N. Kedzie Av. extented N." meant North Kedzie avenue extended north.

Robert I. Joyce in behalf of defendants testified that he did not tell complainants that the street in front of the lots was Kedzie avenue. He also testified that he delivered the con-

She further testified that she signed the contract believing and relying upon the statements made by Leone, she made a deposit of $100; and thereafter up to July 7, 1924, she made various payments on account of said contract which totaled the $1,400 mentioned in the contract. In June, 1926, while at the office of Dellinger & Company she was told by a Mrs. Flynn, secretary of that company, that the street on which the lots were located was Jersey avenue and not Kedzie avenue; that this was the first knowledge she had that the street was named Jersey avenue; that the total amount paid by them amounted to $4,804.21; that thereafter she made no further payments. On cross examination she testified that both Leone and Joyce told her that the lots were on Kedzie avenue; that before she visited the premises she looked at the "blue print" two or three times and noticed the words on what purports to be the street in front of the lots, "N. Kedzie Av. extended N.;" that she knew the word "extended" meant "extended;" and that she knew it was a new subdivision.

Richard L. Spanlen testified that Leone told him he had a couple of lots on Kedzie avenue he would like to interest them in and showed them a little chart and said there were only two left on Kedzie avenue; that they went over and looked at the property; that Leone showed them these two lots on Kedzie avenue; that they talked about the future of Kedzie avenue while standing on the lots in question. On cross examination he testified that he was experienced in reading plans and blue prints and knew that "N. Kedzie Av. extended N." meant North Kedzie avenue extended north.

Robert L. Joyce in behalf of defendants testified that he did not tell complainants that the street in front of the lots was Kedzie avenue. He also testified that he delivered the con-

tract to the complainants two or three months after it was signed.

William Kramer testified that he has been a surveyor since 1878, and that he made the "show plat"; that at the time the "show plat" was made, it was not known what the street now officially named Jersey avenue would be called. It was assumed it would be called North Kedzie avenue because it is a continuation.

Annette D. Flynn testified that some time in 1925 Mrs. Gleaslen came to see her and said she was having a lot of trouble; that she wanted time on her contract.

Benjamin Alpert, engaged in the real estate business for twelve years, testified that in his opinion the fact that Kedzie avenue in front of the lots in question was called Jersey avenue had no effect on the market value of the lots.

The main ground upon which complainants claim the right to rescind the contract and recover the money paid is that they were induced to sign the contract by material false representations made to them by the defendants, and in arguing for a reversal they contend that Doane stated the lots were on Kedzie avenue, and since the lots are not on Kedzie avenue the representation is false and constitutes actual fraud. Counsel for the defendants, however, urge that the only representation made to the complainants was that the street in front of the lots was an extension of North Kedzie avenue. The evidence as to the representations claimed to have been made to the complainants during the course of negotiations which resulted in the execution of the contract is conflicting, the complainants' testimony tending to prove that Doane and Jacobi stated the lots were on Kedzie avenue, while that of the defendants tended to show that no such representation was made. The chancellor heard the cause and had an opportunity to see and hear the witnesses and was in a much better position to judge of their relative credibility and having

dismissed the bill for want of equity he thus, in effect, decided all controverted questions of fact in favor of the defendants and we are not justified in overturning his findings unless they are manifestly against the weight of the evidence. (Hustad v. Cerny, 321 Ill. 354, 359.) However that may be, it is clear from the evidence that the complainants were acquainted with the location and that they examined the lots before they entered into the contract and they knew that this was a new subdivision and that the street in front of the lots would be an extension of North Kedzie avenue, and they purchased the identical lots sold to them by the defendants, it being undisputed that the complainants were given a "show plat" sometime before they visited the lots and that they examined this "show plat" and understood that "N. Kedzie Av. extented N." meant North Kedzie avenue extended north. Under such circumstances we are of the opinion that no such fraudulent representations were made by the defendants as would justify a court of equity in cancelling the contract. Furthermore, it is a well settled principle in regard to false representations that fraud without damage is neither sufficient to support an action at law nor a ground for relief in equity. Fraud and injury must concur to furnish a ground for judicial action. Complainants must show affirmatively that they are in a worse condition than they would have been had the representations been true. (Meenehan v. Rosenfield et al., 236 Ill. App. 4, 10.) The record in the instant case does not disclose that complainants have suffered any injury, even if it might be said that Doane made the representations charged to him, but on the contrary the record discloses that the fact that the street in front of the lots was named Jersey avenue has no effect on their market value.

It is finally contended that the contract is void for the reason that before the lots were offered for sale defendants had not

offered

recorded the plat of the proposed subdivision, and complainants argue that the lots were offered for sale and the contract signed April 21, 1924, while the plat was not recorded until June 11, 1924, and cite sections 1, 2 and 5, chap. 109, Cahill's Illinois Revised Statutes, 1931, p. 2165. Section 1 of that chapter provides that whenever the owner of lands shall wish to subdivide the same he shall cause the land to be surveyed and a plat made which shall describe and set forth all of the streets, giving the names of all such streets; section 2 provides that when the plat is completed it shall be certified by the surveyor and acknowledged by the owner of the land in the same manner as deeds are required to be acknowledged and shall then be recorded, and section 5 provides that whoever shall sell or offer for sale any lot before all the requisitions of this Act have been complied with shall be fined $25. We think this contention is without merit for the reason that the defendants offered to sell to complainants a tract of land described as lots 3 and 4, block 2, in a proposed subdivision. No representation was made that the plat had been recorded, nor that the subdivision had been completed.

We think the record is free from reversible error and the decree is therefore affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

recorded the plat of the proposed subdivision, and complainants argue that the lots were offered for sale and the contract signed April 21, 1924, while the plat was not recorded until June 11, 1924, and cite sections 1, 2 and 3, chap. 109, Cahill's Illinois Revised Statutes, 1931, p. 2163. Section 1 of that chapter provides that whenever the owner of lands shall wish to subdivide the same he shall cause the land to be surveyed and a plat made which shall describe and set forth all of the streets, giving the names of all such streets; section 2 provides that when the plat is completed it shall be certified by the surveyor and acknowledged by the owner of the land in the same manner as deeds are required to be acknowledged and shall then be recorded, and section 3 provides that whoever shall sell or offer for sale any lot before all the requisitions of this Act have been complied with shall be fined $25. We think this contention is without merit for the reason that the defendants offered to sell to complainants a tract of land described as lots 3 and 4, block 2, in a <u>proposed</u> subdivision. No representation was made that the plat had been recorded, nor that the subdivision had been completed.

We think the record is free from reversible error and the decree is therefore affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

35468

104 A

LEO BROYDE,
(plaintiff),
Appellant,

v.

J. F. HOSTY and
JACOB J. BLUMENFELD,
(defendants),
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

266 I.A. 611

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Leo Broyde, brought an action in assumpsit to recover $510 which had been deposited with defendants, J. F. Hosty and Jacob J. Blumenfeld. The cause was tried by the court without a jury, resulting in a finding for the defendants and a judgment against the plaintiff for costs, and plaintiff appealed.

The material facts are that on July 1, 1930, defendants leased of the trustees under the last will and testament of Levi Z. Leiter, deceased, the Leiter Building in Chicago, Illinois, in which lease the defendants were given the right to sublet any part or portion of the building; that on July 21, 1930, the defendants entered into a written agreement with plaintiff, regarding a portion of the building by which defendants granted plaintiff the privilege of conducting therein from July 1, 1930, until June 30, 1932, a department for the merchandising of dresses, for which privilege plaintiff agreed to pay defendants a sum equal to 10 per cent of the gross sales; that for the purpose of securing defendants against any default by plaintiff, plaintiff deposited with defendants $510. In the agreement the defendants were given the right to assign the agreement to a corporation which they might cause to be organized, and upon such assignment to be released from any and all further obligations on

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(plaintiff),

Appellant,

v.

1. P. HOLT and
LYDIA J. ZIMMERMAN,
(defendants),

Appellees.

Plaintiff, Leo Brophy, brought an action in ejectment to recover $210 which had been deposited with defendants, P. P. Holt and Lydia J. Zimmerman. The cause was tried by the court without a jury, resulting in a finding for the defendants and a judgment against the plaintiff for costs, and plaintiff appealed.

The material facts are that on July 1, 1920, defendants leased of the premises under the land with an extension of last 1. Later, decreed, the letter building in Chicago, Illinois, on portion of the building; that on July 27, 1920, the defendants which lease the defendants were given the right to occupy the part entered into a written agreement with plaintiff, occupying a portion of the building by which defendants granted plaintiff the privilege of conducting therein from July 1, 1920, until June 30, 1925, a department for the merchandising of dresses, for which privilege plaintiff, plaintiff deposited with defendants $210. In the agreement that for the purpose of securing defendants against any default by agreed to pay defendants a sum equal to 10 per cent of the gross sales

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their part under said agreement. Attached to the agreement and incorporated as a part thereof was the following:

"The undersigned lessees under a certain Indenture of Lease dated July 1st, 1930, between the Trustees under the Last Will and Testament of Levi Z. Leiter, Deceased, as lessors, and the undersigned as Lessees for and in consideration of One Dollar ($1.00) and other good and valuable considerations, receipt whereof is hereby acknowledged, hereby assigns to the Famous-State Store, Inc., all their right, title and interest as licensors to the within license.

Dated this 1st day of July, A. D. 1930.

(Sgn.) J. F. Hosty (Seal)
(Sgn.) Jacob J. Blumenfeld (Seal)"

The $510 involved in these proceedings was paid to defendants by check dated July 21, 1930, payable to defendants and by them endorsed to the Famous-State Store, Inc., which was the corporation caused to be organized by defendants on June 19, 1930, and to whom the agreement in question was assigned by the defendants. It further appears that plaintiff recognized the Famous-State Store, Inc., as his landlord and dealt directly with it, and paid all rent for the premises to the corporation. It also appears that plaintiff was obliged to vacate the premises without fault on his part.

In arguing for a reversal plaintiff contends that the defense of the defendants was a novation and that the essentials of a novation have not been proven. We are unable to agree with this contention. A novation is a substitution of a new obligation for an old one which is thereby extinguished. (46 Corpus Juris, 573.) The defense was not a novation. In the instant case, the defendants were given the right to assign the agreement to a corporation, at which time they were to be relieved of all obligations under the agreement and the corporation was to assume the obligations of the defendants. The substitution of the corporation was not a subsequent re-adjustment of contractual rights by virtue of a condition arising after the original contract had been agreed upon. There can be no question that the law permits parties, competent to contract

be no question that the two parties, compared to contract existing after the original contract had been signed them. There can mere re-adjustment of contractual rights by virtue of a condition of the agreement. The substitution of the corporation was not a

"The material issues under a certain indenture of lease dated July 1st, 1930, between the Trustees under the Will and Testament of Lewis A. Leiter, deceased, as lessors, and the undersigned as lessee for use in connection at the Leiter ($1.00) and other good and valuable considerations, receipt whereof is hereby acknowledged, hereby assigns to the Tremont-Oaks Realty Corp., all their rights, title and interest as lessees to the within lease.

Dated this 1st day of July, ... 1930.

{Corp. Seal} Attest: J. T. Beaty {Asst. Sec'y}

{Corp. Seal} Leon J. Simmonsfeld {Pres.}"

The $210 involved in these proceedings was paid by defendants by check dated July 21, 1930, payable to defendants and by them endorsed to the Tremont-Oaks Corp., Inc., which was the corporation caused to be organized by defendants on June 10, 1930, and to whom the agreement in question was assigned by the defendants. It further appears that plaintiff recognized the Tremont-Oaks Corp., Inc., as his landlord and dealt directly with it, and paid all rent for the premises to the corporation. It also appears that plaintiff was obliged to vacate the premises without fault on his part.

In arguing for a reversal plaintiff contends that the defense of the defendants was a novation and that the execution of a novation have not been proven. We are unable to agree with this contention. A novation is a substitution of a new obligation for an old one which is thereby extinguished. (46 Corpus Juris, 843.) The defense was not a novation. In the instant case, the defendants were given the right to assign the agreement to a corporation, at which time they were to be relieved of all obligations under the agreement and the corporation was to assume the obligations

and free to do so, to make their own contracts, and it being clear from the agreement in the instant case that the parties entered into an original contract for which another was definitely to be substituted, the consent of the plaintiff to such substitution being expressly given in the agreement, and the Famous-State Store, Inc., taking over the contract, receiving the deposit and accepting the plaintiff as its tenant, the trial court did not err in holding under the circumstances the defendants were discharged from liability.

Plaintiff also contends that the Famous-State Store, Inc., could successfully resist suit on the assignment by pleading the Statute of Frauds, for the reason that the assignment lacked the signature of the Famous-State Store, Inc. No such contention was made by the plaintiff in the trial court and the plaintiff is not now in a position to rely on the Statute of Frauds. (Diamond et al. v. Piggly Wiggly Stores, Inc., et al., 236 Ill. App. 58.) If the plaintiff desired to rely on the Statute of Frauds he should have raised that question in the proper manner in the trial court. (Keller v. Fitzgerrell, 249 Ill. 451.)

We have considered the remaining contentions of the plaintiff and find them without merit.

The trial court did not err in its finding and conclusions. The judgment is accordingly affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

and free to do so, to make their own contracts, and is being depri-
from the agreement in the instant case that the parties entered into
an original contract for which consideration was sufficient to sup-
port it, the consent of the plaintiff to such substitution being
expressly given in the agreement, and the defendants-in-error, in-
taking over the contract, receiving the deposit and accepting the
plaintiff on its terms, the trial court did not err in entering
under the circumstances the defendants were discharged from
liability.

Plaintiff also contends that the Insurance Code, Ins.,
could successfully resist suit on the contract by showing the
absence of funds, for the reason that the requirement lacks the
signature of the Insurance Commissioner, Ins. No such contention was
made by the plaintiff in the trial court and the plaintiff is not
now in a position to rely on the absence of funds. (Citizens Ins.
v. Fidelity Fidelity Corpn., Inc., 82 Ga. App. 50.) If the
plaintiff desired to rely on the absence of funds he should have
raised that question in the proper manner in the trial court. (Fidelity
v. Fidelity Trust, 249 Ill. 491.)

We have considered the remaining contentions of the plain-
tiff and find them without merit.

The trial court did not err in its finding and conclusion.
The judgment is accordingly affirmed.

Bridges, P. J., and Townsend, J., concur.

35477

105 7

ED. PONCHER, doing business as Ed. Poncher & Company, (plaintiff),
Appellant,

v.

STERLING BOLT COMPANY, a corporation, (defendant),
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

266 I.A. 612

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Action was brought by plaintiff to recover a balance of $930.33 claimed to be due for goods sold and delivered. The defendant filed an affidavit of merits and set-off. Tried before the court without a jury, resulting in a finding and judgment against the plaintiff and in favor of the defendant upon the set-off for $736.50, from which the plaintiff appealed.

The statement of claim sets forth a written contract whereby plaintiff sold and the defendant bought "two (2) carloads bolts, nuts, screws, washers, etc., as packed and loaded by Sterling Bolt Co. representative, * * * at Elizabeth, N. J. * * * at $51.30 per net ton, fob cars, Polk St. team tracks of Penn. R. R.;" that defendant paid $4,000 on account and that there was a balance due of $930.33.

The affidavit of merits and defendant's statement of claim averred that on December 27, 1928, prior to the execution of the written contract mentioned in the statement of claim, the parties entered into an oral contract whereby plaintiff sold and defendant bought the identical goods mentioned in the written contract, the price being $22.30 a ton, f.o.b. cars at Elizabeth, N. J.; that the goods were loaded on the cars in New Jersey,

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No. 1231(3) KOMEN DEFIANCE) THE QUESTION OF THE BOND.

Action was brought by plaintiff to recover a balance of $230.35 claimed to be due for goods sold and delivered. The defendant filed an affidavit of merits and set-off. Trial before the court without a jury, resulting in a finding and judgment against the plaintiff and in favor of the defendant upon the set-off for $150.00. From which the plaintiff appealed.

The statement of claim sets forth a written contract whereby plaintiff sold and the defendant bought "two (2) carloads poles, butts, cedars, swamps, etc., to be peeled and loaded by Swift Co. representative, * * * at Kilmarnock, N. Y. * * * at $21.50 per ton, Top cuts, four ft. from ft. Cedar trucks of Tom. 8. N.Y." that defendant paid $4,000 on account and that there was a balance due of $230.35.

The affidavit of merits and defendant's statement of claim entered that on December 27, 1928, prior to the execution of the written contract mentioned in the statement of claim, the parties entered into an oral contract whereby plaintiff sold and defendant bought the identical goods mentioned in the written contract, the price being $18.50 a ton, f.o.b. cars at Kilmarnock, that the goods were loaded on the cars in Nov January,

Appellee.

A.

Appellant,

(plaintiff),
ex Rel. Dunbar & Company,
Bl. Swanson, doing business

Appellees.

corporation, (defendant),
KOMEN DEFIANCE, a

366.1A.612

cause of Action.

Natural Item Equitant

and thereupon defendant offered to pay plaintiff the price agreed upon, but plaintiff refused to turn over the bill of lading or to receive payment; that the goods were shipped to Chicago by plaintiff and that upon arrival of the cars in Chicago plaintiff refused to turn them over to defendant unless he would pay $40 a ton instead of $22.50 a ton; that defendant, having theretofore resold the goods, was compelled to enter into the written contract mentioned in the statement of claim. It was further averred that the merchandise weighed 171,054 lbs.net; that under the verbal agreement there was due to the plaintiff the sum of $3,263.50; that the defendant paid to the plaintiff $4000, overpaying the plaintiff in the sum of $736.50.

Plaintiff's affidavit of merits to defendant's statement of claim denied the alleged verbal contract and denied there was any sum due defendant.

It appears from the record that on January 24, 1929, the defendant entered its appearance and demanded a jury trial, and the cause came on for trial on June 12, 1931; the defendant being present and not represented, hearing was had ex parte and the cause was heard by a jury which rendered a verdict in favor of plaintiff for $930.35 upon which the court entered judgment. June 30, 1931, defendant moved to vacate the ex parte judgment, and thereupon the parties proceeded with the hearing and the court found the issues against plaintiff and in favor of defendant and assessed defendant's damages at $736.50, upon which finding a judgment was entered.

Plaintiff contends that the proceedings of June 30, 1931, were merely to vacate the ex parte judgment and that it was not proper for the court to hear and determine the issues involved and render judgment in favor of the defendant. It appears from the bill of exceptions that upon the trial of the cause plaintiff's counsel offered no objection to the method adopted by the court, and he made no objection

opposition to the motion rendered by the court, for we make no objection
tions that upon the trial of the cause Plaintiff's summary dismissal on
judgment in favor of the defendant. It appears from the brief of appel-
for the sums so paid and determine the issues involved and render
more nearly to accord the <u>de novo</u> judgment and that it was not decided

Plaintiff contends that the December 2nd, 1937,
of $138.00, when after finding a judgment was entered
Plaintiff and in favor of defendant and reversed Plaintiff's judgment
proceeded with the hearing and the court found the issues against
moved to vacate the <u>de novo</u> judgment, and thereupon the parties
thus after the court entered judgment". June 30th, 1937, Defendant
of a jury which rendered a verdict in favor of Plaintiff for $400.00
and not rehearsed, hearing was had <u>de novo</u> and the cause was issued
came came on for trial on June 29, 1937; the defendant being present
defendant entered its appearance and demanded a jury trial, and the
cause due defendant.

It appears from the record that on January 1st, 1938, the
Plaintiff's affidavit of merits in defendant's statement
of claim denied the alleged agency contract and denied there was not
title $4000, exercising the Plaintiff in the sum of $138.00.
Plaintiff the sum of $3,262.80; that the defendant paid to the Plain-
717.03% Ipsecott that under the actual agreement there was due to the
of Plain. It was further averred that the aforementioned alleged
belief to enter into the written contract mentioned in the statement
a fact that defendant, having threatened revoke the power, was com-
pelled to accept $2,500.00 in full settlement of $3,262.80 when in
any fact then existing at the date in Chicago Plaintiff refused to make
receive payment; that the terms were changed to Plaintiff
when, but Plaintiff refused to turn over the title of Indian or to
and threatened defendant offered to pay Plaintiff the price agreed

to a determination of the issues. In fact he expressly agreed that the cause be tried by the court as is evidenced by the following colloquy between the court and plaintiff's counsel: "The Court: Before we go further it is definitely understood that this is the trial of the case, is it not?" Attorney for plaintiff: "Yes, Your Honor." Furthermore, it is clear plaintiff's counsel knew that the hearing was on the merits, as is evidenced by the fact that he called and examined witnesses to prove plaintiff's case and thereafter made a motion for a new trial and in arrest of judgment. Moreover, the record clearly shows that the ex parte judgment was vacated and set aside and that a jury trial was waived and the cause submitted to the court for trial without a jury. The record imports absolute verity and is the sole, conclusive and unimpeachable evidence of the proceedings in the lower court. (People v. Kuhn, 291 Ill. 154, 162.)

It is also claimed that a motion to vacate an ex parte judgment must be supported by a verified petition or affidavit and that the record in the instant case does not disclose that any affidavit or verified petition was filed by defendant. Even so, where a judgment is opened on motion of defendant, plaintiff by appearing and taking part in the trial, waives his right to except to the order, and it is not reviewable on appeal. (Lox et al. v. Bradley, 179 Ill. App. 1; National Lead Co. v. Mortell, 261 Ill. App. 332, and cases cited.) However, the record shows that the verified petition of Louis L. Gordon was filed June 30, 1931.

The next ground urged for reversal is that the finding and judgment is not supported by the evidence. It is conceded that the burden of proof was upon the defendant to establish his claim of set-off by a preponderance of the evidence. The plaintiff's evidence discloses that on December 24, 1927, he met Gordon and Dorph,

disclosed that on December 24, 1937, he met Gordon and Forbes, set-off by a preponderance of the evidence. The Plaintiff's evidence proven of fraud was upon the defendant to establish his claim of judgment is not supported by the evidence. It is conceded that the main ground relied for recovery is that the finding and position of Count I. Gordon was filed June 30, 1937. Exhibit 1, pp. 119 ff. pp. 1; Bjornson Land Co. v. Mortvedt, 251 Ill. App. 378. But cases cited.) However, the record shows that the entitled to the order, and it is not reviewable on appeal. (Cox et al. v. Cox et al., 293 Ill. 11.) Defendant's motion for a new trial, waives his right to object and taking part in the trial, waives his right to have a judgment is opened on motion of defendant, Plaintiff by affidavit or verified petition was filed by defendant. Even on that the record in the instant case does not disclose that any judgment must be supported by a verified petition or affidavit and

It is also claimed that a motion to vacate or to quash

of the proceedings in the lower court. (Jacobs v. Hahn, 242 Ill. 184, 189.)

plaintiff verify and is the note, consequently the misrepresentation relied expressly made to the court for trial without a jury. The record discloses submitted to the court for trial without a jury. The record discloses that defendant made a motion for a new trial and in arrest of judgment, thereafter made a motion for a new trial and in arrest of judgment. However, the record clearly shows that the <u>re-hearing</u> judgment was vacated and not made and that a jury trial was waived and the cause then plaintiff be called and examined witnesses in Bruno Plaintiff's case and then that the hearing was on the merits, as is evidenced by the fact "Ice, Lump Sugar." Furthermore, it is also Plaintiff's counsel's opinion in the brief of the case, is it not, "Among the plaintiff's contradictory statements the court was [illegible] relying between the cause be tried by the court as is evidenced by the [illegible] to a determination of the issues. It fact be especially stated

representatives of the defendant, at his office and showed them a typewritten list of materials which he owned at Elizabeth, N. J., which list they examined, and after inquiring if the materials were rusty and being informed they were not, said they would look at it and "if it is not rusty will take the materials at $40 per ton;" that he and Harry Dorph, vice president of defendant, then went to Elizabeth, where Dorph was shown the material at the plant of the Durant Motor Company and there Dorph informed plaintiff that he would let him know if he wanted the material; that Dorph asked plaintiff to cut the price on the nails and tacks; that plaintiff gave Dorph a price of $22.50 a ton on the tacks, but that price had nothing to do with the rest of the material; that on January 14, 1928, he called Dorph and informed him the car was in Chicago; that Dorph and Charles Gordon, president of defendant, called at his office and the written contract in question was drawn by Gordon personally.

Defendant's evidence discloses that it entered into negotiations with plaintiff in Chicago to purchase a quantity of bolts, nuts and like material, located in the plant of the Durant Motor Company at Elizabeth, N. J.; that on the basis of certain lists submitted by plaintiff, and his statements, a tenative agreement was entered into to pay $40 a ton for said material, subject to an inspection and examination by a representative of the defendant; that on December 25, 1927, Harry Dorph, together with plaintiff, departed for Elizabeth and arrived there on December 26; that after an examination of the material Dorph discovered that a great portion of the same was in an unsatisfactory condition and not in conformity with the list, and thereupon refused to pay $40 a ton for the entire lot; that further negotiations ensued and the parties reached an oral agreement on the basis of $22.50 a ton; that the defendant proceeded to pack and crate the material for shipment to Chicago; that when

to back-up evade the warrant for shipment to Chicago) that upon
delivery on the basis of $20.00 a ton; that the defendants succeeded
with the aid of the warrant; that on January 14, 1928, he called
Clifton Dundon, president of defendant, online at his office and
told him the car was in Chicago that Dorph had
to do with the sale of the material; that on January 14, 1928, he called
a price of $22.00 a ton on the basis, but that price had nothing to
do but the price on the nails and stated that plaintiff make Dorph
let him know if he wanted the material; that Dorph asked plaintiff
Patent Motor Company and there Dorph informed plaintiff that he would
Elizabeth, above Dorph was shown the material at the plant of the
and Henry Dorph, vice President of defendant, then went to
and "if it is not ready will take the material at $20 per ton";
that he would inform that was a; said that would look at it
ready and being informed that was a, said that would look at it
again time they examined, and after undoing it the material was
a shipment like of material might be owned at Elizabeth, N. J.;
representatives of the defendant, at the office and showed them

Dorph had completed the packing and crating he asked plaintiff for the bill of lading, but was told the Durant people would not recognize him; that by the time the material arrived in Chicago, defendant had already committed itself to deliver a great portion of the material to other parties; that plaintiff took advantage of the situation and insisted on $40 a ton; that defendant, in order to avoid law suits with its customers, signed the contract of January 14, 1928, and paid plaintiff $4,000.

At the close of all the testimony the trial court found that the plaintiff and a representative of the defendant entered into negotiations for the sale of obsolete stock of the Durant Motor Company and a tentative agreement of $40 a ton was agreed upon, subject to inspection and examination by a representative of the defendant; that the plaintiff and the defendant's representative went to the location of the material and defendant refused to pay $40 a ton as had been tentatively agreed upon, claiming the material was not in such condition that it could pay such sum; that negotiations were then and there entered into for the sale of the material at the price of $22.50 a ton, and that the subsequent contract that was made in Chicagowas null and void and that it was a contract concerning goods that had already been definitely and positively purchased by the defendant in the east.

In the case of Mills & Co. v. Duke, 232 Ill. App. 277, 280, the court said:

"Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review."

of the matter is concerned, does a court
sit in a mich petite position in each case to determine the truth
number of credibly and a first rank court circumstance. Its
limited reach - the effectiveness of the adversarial system, their
observers on the stand in each case that do not appear from the
weight of the evidence. There are many things which a jury
discern the verdict of a jury unless it is clearly against the weight
the evidence, jurors are not required to give reasons for their
decisions. Even the testimony of the jurors' attempts to
be admissible, a court of review in not warranted in disturbing
the verdict of the jury, because under the law this court cannot
substitute its own opinion and conclusions for those of the jury.

"Where the controlling point in the case is supported by
positively pronounced by the defendant in the case."

In the case of Miller v. D. C. Dyer, 320 Ill. App. 647,
1939, the court said:

> "The contract concerning deeds that had already been delivered and
> placed that was made in Oklahoma null and void and that it was a
> material at the price of $25.00 a ton, and that the representations
> representations were then and there entered into for the sale of the
> did not in fact condition that it would rub only and that
> did a ton we had been tentatively stated upon, pointing the material
> went to the location of the material and defendant refused to pay
> statement that the plaintiff and the defendant's representative
> employed to inspection and examination by a representative of the
> Company and a telephone statement of C.O.D. the ore cannot there,
> negotiations for the sale of phosphate rock of the Ozark Water
> that the plaintiff and a representative of the defendant entered into
> to avoid law suits with its customers, signed the contract of record
> by the plaintiff and instituted an law a test that relationship. In order
> of the material to other purchases that plaintiff this represented
> defendant had already committed itself to fulfill a first barium
> recognize that that by the time the material arrived in Chicago,
> for the mill of Dayton, for more told the former people would not
> longer had completed the pending and crushing be other plaintiff

The findings of the court as to the facts in the case, where it is tried without a jury, are entitled to the same presumptions as the verdict of the jury, and they will not be set aside by a court of review unless they are manifestly against the weight of the evidence. (Fisk v. Hopping, 169 Ill. 105; Field v. Chicago & Rock Island R. R. Co., 71 id. 458; Marble v. Marble, 304 id. 229; City of Quincy v. Kemper, 304 id. 303; Illinois-Indiana Fair Association v. Phillips, 241 Ill. App. 454; Elmer v. Miller, 255 id. 465, and cases cited.) After examining the testimony in this case, we are of the opinion that we would not be warranted in holding that the findings are against the manifest weight of the evidence.

It is also claimed that exhibits introduced and admitted in evidence on behalf of the defendant were improper. It appears from the record that the court admitted in evidence certain telegrams sent from Dorph while at Elizabeth, to Gordon, the first of which advised Gordon that Dorph had just completed deal at $22.50 a ton for the material. Even if it was error, it will not be grounds for reversal where there is sufficient proper evidence to justify the finding, as the rule is, that no improper or immaterial evidence will be presumed to influence the court in reaching a decision. (Schroeder v. Harvey, 75 Ill. 638; Kreiling v. Northrup, 215 id. 195; Pratt v. Davis, 224 id. 300.) There is sufficient proper evidence to justify the judgment.

It is finally contended that the oral contract being for merchandise of a value exceeding $500 is not enforcible under the Statute of Frauds. (Sec. 4, ch. 121½, Smith-Hurd, 1931.) In our opinion the point cannot be urged as a ground for reversal for the reason that it was not stated as one of the defenses in the affidavit of merits of the plaintiff. Rule 15 (n) of the Municipal

court of Chicago provides that "All such grounds of defense or reply as would raise issues of fact not arising out of the preceding pleadings must be specifically pleaded, including * * * Statute of Frauds, * * * and all other matter by way of confession and avoidance." (See also Diamond v. Piggly Wiggly Stores, Inc. et al., 236 Ill. App. 68, 72; Beard et al. v. Converse, 84 Ill. 512, 515.) The Statute of Frauds was not relied upon on the hearing in the Municipal court of Chicago and it cannot now be relied upon here. (Sanford v. Davis, 181 Ill. 570, 572; Levy v. Standard Elevator Co., 296 id. 295, 304.)

We find no reversible error and the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

court of Chicago provides that "All such persons of evidence or
exhibit as would raise issue of fact not arising out of the pretrial
pleadings must be specifically pleaded, including * * * [e]states of
Trusts, * * * and all other matter by way of confession and avoid-
ance." (See also Illinois v. Fidelity Finance Corp., 380 Ill. 47,
52 Ill. App. 2d, 73; Board of Ed. v. Commerce, 64 Ill. 562, 130.)
The statute of Frauds was not raised upon the hearing in the
Municipal court of Chicago and it cannot now be relied upon here.
(Dunlevy v. Avis, 287 Ill. 270, 272; Levy v. Standard Electric Co.,
316 Ill. 82, 85.)

We find no reversible error and the judgment is
affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

106 A

35492

WILLIAM SIEGEL,
(plaintiff),
Appellant,

v.

SOLOMON BENAMY,
(defendant),
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

266 I.A. 612

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered on a note executed by defendant, dated September 12, 1927, for $1000, "payable to bearer on demand," and on defendant's petition vacated and set aside. There was a trial before the court without a jury, and a finding and judgment in favor of the defendant, to reverse which the plaintiff prosecutes this appeal.

At the hearing defendant admitted the execution of the note and that it was given for a valuable consideration to one Harold Shlensky, but claimed it was null and void because at the request of Shlensky, on November 16, 1927, he executed a quitclaim deed conveying to one Anderson certain real estate, in consideration of which Shlensky agreed to cancel said note.

The undisputed evidence discloses that plaintiff is a stock, bond and grain broker and was engaged in buying notes and junior mortgages, and that he purchased the note of Harold Shlens ky on July 12, 1928, for $900, and that after he purchased the note he informed defendant of that fact and demanded payment, but was told defendant would not pay the note.

From the testimony of the defendant it appears that he was the owner of a fifty-two apartment building in Chicago, upon

SOCIAL SCIENCE

which there were three mortgages, the first for $150,000, the second for $45,000 owned by Edward M. Bertha, and the third for $10,000, which was held by Shlensky; that on November 16, 1927, being unable to meet the payment on the second mortgage, at the request of Shlensky he conveyed the property to Roy C. Anderson, and was told by Shlensky that he (defendant) would be released of all liability on the mortgages; that before he and his wife executed the quitclaim deed he asked Shlensky when he was going to give him back his $1000 note and was told, "why do you worry about this one note; I have ten thousand dollars worth of your notes." He also testified that at the time he executed the deed he received a check for $1000 and was told by Bertha that "if we get all our money out of it, I will see that you get something out of it." On cross-examination he testified he conveyed the property to the holder of the second mortgage or someone associated with the holder of the second mortgage, not to Shlensky or anyone connected with him; that he understood it was a deal made with the second mortgage man.

On behalf of the defendant, Harold Shlensky testified that he was engaged in the mortgage business; that he never had any agreement with defendant to cancel the note and never told him that he would cancel and deliver the note in consideration of his conveying the property to Anderson; that he never received the deed; that the deed was delivered in his presence to Edward M. Bertha; that he had a conversation with the defendant about October 1, in Bertha's office and that at this conversation Bertha said to defendant, that he (Bertha) was obligated to pay the principal and interest on the first mortgage and that the first mortgage people were going to foreclose and that he would let them unless he got a deed from defendant; that defendant said he would give a quitclaim deed to Bertha. The

witness further testified that he received no benefit by virtue of the deed; that Bertha at this conversation did not say anything as to the disposition of the third mortgage; that no arrangement was made about the third mortgage at all and that he told Bertha he would not interfere with his collecting the rents.

Edward M. Bertha testified on behalf of the defendant that he is engaged in the real estate and mortgage business and was so engaged in 1927; that Roy E. Anderson was indirectly connected with him in 1927; that his firm had a second mortgage on defendant's property; that defendant had gotten behind in the payments on the first and second mortgages; that a deal was consummated whereby his firm acquired title and they made arrangements with Shlensky for the payment of the third mortgage. On cross examination he testified that as consideration for the deed defendant was paid $1,000, and that five or six months later they purchased Shlensky's third mortgage at a discount of $2,700.

The plaintiff seeks to reverse the judgment on the ground that the finding of the court is manifestly against the weight of the evidence. The defendant claimed that for a valuable consideration plaintiff agreed to cancel the note. This was an affirmative defense and the burden was upon the defendant. While it is true that the finding of the court as to the facts in a case, where it is tried without a jury, is entitled to the same presumptions as the verdict of a jury and will not be set aside by a court of review unless it is manifestly against the weight of the evidence, yet where, after giving consideration to the variant stories of the witnesses, the reviewing court is of the opinion that the finding is clearly against the weight of the evidence, it is its duty to set it aside and reverse the judgment. "A performance of this duty is absolutely essential for the preservation

"A preponderance of the evidence is especially essential for the preservation of the opinion that the finding is clearly against the weight of the evidence." It is idle to set it aside and ignore the judgment.

Edward E. Perkins testified on behalf of the defendant that he is employed in the real estate and mortgage business and was so employed in 1923; that Roy B. Anderson was indirectly connected with him in 1923; that his firm had a second mortgage on property owned by Anderson; that defendant had option behind in the payments on the first and second mortgages; that a deal was consummated whereby the firm acquired title and they made arrangements with Kennedy for the payment of the third mortgage. On cross examination he testified that no consideration for the deed defendant was paid Kennedy, and that five or six months later they purchased Kennedy's third mortgage at a discount of $2,000.

The plaintiff seeks to reverse the judgment on the ground that the finding of the court is manifestly against the weight of the evidence. The defendant claimed that for a valuable consideration plaintiff agreed to cancel the note. This was an affirmative defense and the burden was upon the defendant. While it is true that the finding of the court as to the facts in a case, where it is tried without a jury, is entitled to the same presumption as the verdict of a jury, and will not be set aside by a court of review unless it is manifestly against the weight of the evidence, but where, after giving consideration to the various aspects of the witnesses, the reviewing court is of the opinion that the finding is clearly against the weight of the evidence, it is not only the right but the duty of the court to set it aside and reverse the judgment.

of the rights of citizens and property owners * * *." (C. & E. I. R. R. Co. v. Keegh, 163 Ill. 305, 308.)

After a careful reading and examination of the entire evidence, we have reached the conclusion that the finding and judgment of the court is manifestly against the weight of the evidence and that justice will be best served by a retrial of the case.

The judgment of the Municipal court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

of the rights of citizens and property owners." (C. & E. I. R. R. Co. v. Perry, 166 Ill. 392, 398.)

After a careful reading and consideration of the entire evidence, we have reached the conclusion that the finding and judgment of the court is manifestly against the weight of the evidence and that the judgment will be set aside by a reading of the case.

The judgment of the Municipal court is reversed and the cause is remanded.

Reversed and remanded.

Gridley, P. J., and Dunham, J., concur.

35492

WILLIAM SIEGEL, (plaintiff), Appellant,	)	
v.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
SOLOMON BENAMY, (defendant), Appellee.	)	

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered on a note executed by defendant, dated September 12, 1927, for $1000, "payable to bearer on demand," and on defendant's petition vacated and set aside. There was a trial before the court without a jury, and a finding and judgment in favor of the defendant, to reverse which the plaintiff prosecutes this appeal.

At the hearing defendant admitted the execution of the note and that it was given for a valuable consideration to one Harold Shlensky, but claimed it was null and void because at the request of Shlensky, on November 16, 1927, he executed a quitclaim deed conveying to one Anderson certain real estate, in consideration of which Shlensky agreed to cancel said note.

The undisputed evidence discloses that plaintiff is a stock, bond and grain broker and was engaged in buying notes and junior mortgages, and that he purchased the note of Harold Shlens ky on July 12, 1928, for $900, and that after he purchased the note he informed defendant of that fact and demanded payment, but was told defendant would not pay the note.

From the testimony of the defendant it appears that he was the owner of a fifty-two apartment building in Chicago, upon

39466

Plaintiff's attorney,	
(Plaintiff),	
Defendant.	Notice of Motion.
Defendant's Attorney,	
(Defendant),	
Respondent.	

To: The above named Defendant and Respondent.

Take notice that the Plaintiff will apply to the Court at the Court House, in the City of Toronto, on July 13, 1900, for leave to amend the Statement of Claim herein by inserting therein the following paragraph:

"The Plaintiff says that the said Defendant, on or about the 1st day of June, 1900, at the City of Toronto, in the County of York, sold to the Plaintiff a quantity of coal, and the Plaintiff says that the said coal was of a very inferior quality, and was not fit for the purpose for which the Defendant knew the Plaintiff required it, and was not of the quality and description which the Defendant represented it to be, and which the Plaintiff agreed to accept."

And for such further or other order as to this Honourable Court may seem meet.

Dated the 10th day of July, 1900.

Yours, etc.,

Plaintiff's Attorney.

35501

107 A

ABBOT VENTILATING COMPANY, a corporation, (plaintiff),
Appellee,

v.

EDWARD W. KAISER and ALBERT G. KAISER, copartners, doing business under the name and style of E. B. KAISER, (defendants),
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

266 I.A. 612

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit brought by plaintiff against the defendants for furnishing labor and material for the installation of a ventilating system. Heard by a jury, a verdict for plaintiff for $2,150, and judgment on the verdict, from which defendants appealed. The plaintiff has not appeared or filed a brief in this court.

The plaintiff's declaration consisted of the common counts and three special counts, the first special count alleging that on September 12, 1929, plaintiff made a verbal contract with defendants to furnish certain labor and material for the installation of a ventilating system in the building to be erected at Chicago avenue and Laramie avenue, Chicago, Illinois, for which defendants agreed to pay $9,500; that plaintiff proceeded with its part of said contract until December 18, 1929, when defendants ordered plaintiff to stop work, at which time it had installed labor and material to the value of $2,303. The second special count in addition states the contract price was $10,930, and the value of the labor and material furnished at the time the work was stopped was $2,978. The third special count sets forth that the defendants

ABBOT VALLEY LIMO COMPANY,
a corporation,
(plaintiff),

-vs-

[illegible],

A.

[illegible] and [illegible]
G. [illegible], copartners, doing
business under the name and
style of L. G. [illegible]
(defendants),

Appellants.

Mr. Justice [illegible] delivered the opinion of the court.

This was an action in assumpsit brought by plaintiff against the defendants for furnishing labor and material for the installation of a ventilating system. Upon a jury, a verdict for plaintiff for $8,180, and judgment on the verdict, these which defendants appealed. The plaintiff has not appeared or filed a brief in this court.

The plaintiff's declaration consisted of the common counts and three special counts, the first special count alleging that on September 12, 1928, plaintiff made a verbal contract with defendants to furnish certain labor and material for the installation of a ventilating system in the building to be erected on Ogden avenue and Larrabee avenue, Chicago, Illinois, for which defendants agreed to pay $9,800; that plaintiff proceeded with the work pursuant to said contract until December 19, 1928, when unforeseen changes in plaintiff's shop work, at which time it was impossible labor and material furnished at the time the obligation was $8,878. The third special count sets forth that the defendants

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promised to pay plaintiff such sum of money as it reasonably deserved to have, and that the reasonable value of the labor and material furnished under the terms of said contract was $2,094. The defendants pleaded non assumpsit.

The plaintiff's evidence disclosed that in July or August, 1929, H. Y. Weinshank, secretary and treasurer of the plaintiff, called at the office of defendants and there met Edward F. Sullivan, chief estimator and purchasing agent for plaintiff, who told him that defendants had a set of plans for a proposed store at Laramie and Chicago avenues, and asked Weinshank to make an estimate on the ventilating system; that Weinshank made such an estimate and gave it to Sullivan. Sometime thereafter Sullivan told Weinshank that the erection of the building had commenced; that they were setting forms to pour the concrete and inquired if Weinshank would have any objection to visiting the premises and checking over the holes for the ducts, though nothing had been definitely settled about any contract, but that he had no doubt they were going to get the contract; Weinshank went to the building, checked over the holes and reported to Sullivan; later Sullivan told Weinshank he would let him know when he could start work; that in November Sullivan told Weinshank that it looked like in a few days plaintiff would be able to start; that he expected a contract any day and that if defendants entered into a contract for the erection of the building, plaintiff would receive a contract to install a ventilating system. On cross examination he testified that plaintiff was to receive a contract for the ventilating work as soon as defendants received their contract and that any work plaintiff did previous to receiving a formal contract from defendants would be strictly at plaintiff's risk.

It also appears from the record that defendants on April 16, 1930, filed a verified claim for lien in the office of the clerk

19, 1920, filed a satisfying claim for loss in the office of the Stark
County Auditor.

It also appears from the record that Plaintiff, after
stamp from Plaintiff did hesitate to construct a locust cam-
and that any such Plaintiff did hesitate to construct a locust cam-
for the specifying work he does or otherwise received their bonded
examination he testified that Plaintiff was to receive a contract
mould containg a contract to install a ventilating system. He never
entered into a contract for the erection of the building. Plaintiff
admit that he obtained a contract and did put it otherwise
shown that it broke like in a few days Plaintiff would be able to
time when he could start work that is November Defendant said Plain-
reported to Williams later Williams said Plaintiff he would let the
contract. Defendant went to the building, looked over the plans
and contract, but does he and he thought they were going to buy them
holes for the ducts, though nothing had been definitely agreed
have any objection to visiting the Plaintiff and speaking over the
setting forms to pour the concrete and inquired if Plaintiff would
that the erection of the building had commenced that they were
time it to William. Thereafter Defendant called Plaintiff on
on the specifying Plaintiff informed him that he was an estimate and
Jamieson and Dinardo examen, was asked returned to them an estimate
told him that determined had a set of plans for a bathroom since he
W. William, chief estimator and bookkeeper owned for Plaintiff, who
Plaintiff, office of the office of Defendants was there but Plaintiff
Defendant, 1920, E. X. Schenkel, secretary and treasurer of the

The Plaintiff's evidence discloses that in July or
August 1920 Plaintiff signed some blueprints

The defendants pleaded non assumpsit.

Upon the trial of said cause the Court, after hearing the evidence of the parties and their witnesses, and the proposition argued by the parties and

of the Circuit Court of Cook County in which they alleged that on September 20, 1929, they made and entered into a contract with the owners of the premises at the southeast corner of Laramie and Chicago avenues to install plumbing, heating, ventilating and sprinkler work, in which was included the amount due to plaintiff, and that thereafter defendants filed a cross bill to foreclose their mechanic lien in the case of Central Trust Company of Illinois v. Carl A. Mueller, No. B2C521, in the Circuit Court of Cook County, in which defendants alleged that on September 20, 1929, they entered into a contract with the owner of the premises located at Chicago and Laramie avenues, Chicago, Illinois, whereby they agreed and undertook to fabricate and furnish all necessary material and do all necessary work and install in said building then under construction on said premises, plumbing, heating, ventilating and automatic sprinkler system; that pursuant to the terms of said contract they furnished labor and material for the installation of such work and material. The record also discloses that on December 18, 1929, defendants wrote plaintiff "to stop all work in your line in the above building until further notice." Plaintiff never thereafter received an order to proceed with the work.

Defendants' version is that Sullivan had a conversation with Weinshank about September 12, 1929, regarding the building in question at which he was told that when defendants secured from the owners a formal written contract, he would have a contract made out to plaintiff for the ventilating work and that Weinshank replied, "All right, Ed. When your formal written contract comes through, then you and I can get together," and that later he informed Weinshank that defendants had commenced work on the building; that he could not offer plaintiff any contract, but if plaintiff cared to go ahead he was at liberty to do so; that the defendants never got a formal written contract for the erection of the building; that they went ahead and

did the work without a formal written contract and that they knew all the time that plaintiff was doing the ventilating work.

It is assigned as error by the defendants that the court admitted improper evidence, in that it admitted the verified claim for a mechanic's lien filed by defendants, in which they set forth that they had made a contract with the owner of the premises. There was no error in admitting the claim for lien. The main question in the instant case is, was there a contract between the parties to this cause, and any evidence tending to prove that fact was competent.

Defendants' next contention is that instruction No. 5 should not have been given. There is no merit in this contention. This instruction told the jury if defendants promised plaintiff they would enter into a contract with plaintiff for furnishing, etc., in the event they entered into a contract with the owner of the premises, and if they believed from the evidence that a contract between the owner and the defendants was entered into, then upon the happening of such contingency, a contract thereby came into existence between the plaintiff and defendants.

There is no dispute as to the amount of the verdict. The defendants admit plaintiff has a claim for the reasonable value of the labor and material furnished by it, but it is their contention that the verdict is contrary to the manifest weight of the evidence, defendants arguing that it was never Sullivan's intention to commit defendants to a contract with plaintiff before they were protected by a "formal written contract" with the owner of the premises, and that the execution of a written contract was never proved. The only evidence that the contract between plaintiff and defendants was to be binding when the defendants received a "formal written contract" was that of Sullivan, Weinshank testifying that plaintiff was to receive a contract for the ventilating work when defendants received a formal

did the work without a formal written contract and that they knew all the time that plaintiff was doing the ventilating work.

It is contended on appeal by the defendants that the court admitted improper evidence, in that it admitted the verified claim for a mechanic's lien filed by defendants, in which they set forth that they had made a contract with the owner of the premises. There was no error in admitting the claim for lien. The main question in this case, and the only evidence tending to prove that fact was competent, the instant case is, was there a contract between the parties in which defendants' act consisted in that instruction is. 5

This instruction told the jury if defendants promised plaintiff they would enter into a contract with plaintiff for furnishing, etc., in the event they entered into a contract with some of the premises, and if they believed from the evidence that a contract between the owner and the defendants was entered into, then upon the performance of such contingency, a contract thereby came into existence between the plaintiff and defendants.

There is no dispute as to the amount of the verdict. The defendants admit plaintiff has a claim for the reasonable value of the labor and material furnished by it, but it is their contention that the verdict is contrary to the manifest weight of the evidence, defendants argue that it was never William's intention to commit defendants to a contract with plaintiff before they were informed by a "formal written contract" with the owner of the premises, and that the execution of a written contract was never done. The only evidence that the contract between plaintiff was performed was to be gathered from the defendants themselves in a "formal written contract" was signed for a contract for the ventilating work. It was not until

contract. He said nothing about a written contract. In the case of Mills & Co. v. Duke, 232 Ill. App. 277, 280, the court said:

"Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. The question of the preponderence of the evidence does not arise at all in this court. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review." (See also Eimer v. Miller, 255 Ill. App. 465, and cases cited.)

After examining and considering the testimony in this case, we are of the opinion that we would not be warranted in holding the verdict is contrary to the manifest weight of the evidence, and as there is no reversible error in the record the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

contract. He said nothing about a written contract. In the case of Mills & Co. v. Duke, 293 Ill. App. 277, 280, the court said:

"Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. The question of the preponderance of the evidence does not arise at all in this court. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review." (See also Bimer v. Miller, 295 Ill. App. 485, and cases cited.)

After examining and considering the testimony in this case, we are of the opinion that we would not be warranted in holding the verdict in contrary to the manifest weight of the evidence, and do there is no reversible error in the record the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

35525

ELIZABETH RYAN,
Plaintiff-Appellee,

vs.

SINGER SEWING MACHINE CO., Inc.,
Defendant-Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

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MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by plaintiff against Henry A. Blair and Frederick H. Rawson as receivers of the Chicago Railways Company, Singer Sewing Machine Company and James Dwyer, for injuries to her person received by being struck by an automobile. The case was dismissed on motion of plaintiff as to the defendants Blair and Rawson, and the cause proceeded against the Singer Sewing Machine Company and Dwyer. The defendant Dwyer was found not guilty. Plaintiff recovered a judgment on the verdict of the jury against the Singer Sewing Machine Company for $10,500. To reverse this judgment the Singer Sewing Machine Company appealed.

The declaration consisted of four counts. The first count charges the accident to have occurred on January 12, 1929, and predicates the charge against the defendants Blair and Rawson, upon the inducement that at that time and place the defendants Blair and Rawson, as receivers of the Chicago Railways Company, as a common carrier of passengers for hire, were carrying the plaintiff as a passenger; that the defendants Singer Sewing Machine Company and James Dwyer were operating, driving, managing and propelling a certain motor vehicle in an easterly direction upon, along and over Madison street, at the time and place in question; and charges that said defendants, Singer Sewing Machine Company and James Dwyer, by and through their agents and servants in charge of their said motor vehicle, so negligently, carelessly and recklessly ran, managed, operated and controlled their said motor vehicle past the said street car from which the said plaintiff was then and there

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alighting, as to cause same to collide with the plaintiff while she was so alighting. The second count charges the same facts and that the defendants Dwyer and Singer Sewing Machine Company operated the said motor vehicle in question through their duly authorized agent along said street car, in violation of the statute which prohibits a motor vehicle from passing within ten feet of the running board or lower step of any street car stopped for the purpose of receiving or discharging passengers. The third count charges the same facts and that the defendants Singer Sewing Machine Company and James Dwyer, through their agent and servant, in violation of the statute prohibiting automobiles from being driven within ten feet of the running board or last step of any street car stopped for the purpose of receiving and discharging passengers. The fourth count is predicated upon the same matters of inducement as the preceding counts, and charges the defendants Singer Sewing Machine Company and James Dwyer, by their servant and agent in charge of their said motor vehicle, with so wilfully, wantonly and maliciously, and with complete absence of care and disregard for the rights of plaintiff and others then alighting from said street car, and with an entire absence of care and with a willingness to inflict injury upon the plaintiff. Each count alleges that the plaintiff was at all times in the exercise of ordinary care for her own safety. The defendant Singer Sewing Machine Company filed a plea of general issue and a special plea of nonownership and operation, and the defendant James Dwyer filed a plea of general issue and a special plea of nonownership and operation and a further plea that he was an agent of the defendant Singer Sewing Machine Company; that at the time of the accident the automobile described in the declaration was driven by one Joseph Duff; that at the time of the accident the said Joseph Duff was an agent in the employment of the said Singer Sewing Machine Company and was acting within the scope of his employment, and in

the service of the defendant Singer Sewing Machine Company.

The record discloses that about 4:30 p. m., January 12, 1929, the plaintiff was a passenger in the rear car of a two-car train of the Chicago Railways Company, eastbound on Madison street, Chicago, Illinois, and when the street car arrived at Lincoln street it stopped at the regular stopping place on the west side of Lincoln street for her to alight; that before leaving the car she looked to her right or west and saw nothing, alighted and stepped a foot or two from the car when she was struck by an automobile driven by Joseph Duff, coming from the west, which, after it struck the plaintiff, did not stop but continued east at the rate of twenty miles per hour. She was severely injured, receiving a basal skull fracture, a fracture of the iliac pelvic bone, right side, and other injuries, and she remained under the care of a physician for two years and four months. There is no conflict in the evidence so far as it relates to the question of negligence, as the defendants introduced no evidence. The verdict imports that the jury found that the person who was driving the automobile was guilty of negligence and that plaintiff was not guilty of contributory negligence, and the verdict in these respects cannot be successfully challenged.

The main defense relied on by the defendant is its claim that it was not the owner or operator of the automobile and that there is no evidence in the record which in any manner connects it with the injury to the plaintiff. On that question the undisputed facts are that the automobile which struck plaintiff was being driven by Joseph Duff. It had a specially constructed platform, built for the purpose of attaching and carrying sewing machines and was used in the business of the Singer Sewing Machine Company for the purpose of hauling machines, and people working out of defendant's store were permitted to use the automobile for the purpose of

the service of the defendant Pinkus Realty Corporation.

The second circumstance that stands at the p. m., January 12, 1938, the plaintiff was a passenger in the rear car of a two-car train of the Culver Railroad Company, operated by Motion Street, Chicago, Illinois, and was the injured car arrived at Glenside at Lincoln street for the regular stopping time on the near side of the platform; that before leaving the car she looked to her right or west and saw nothing, although and stepped a foot or two from the car when she was struck by an automobile driven by Joseph Smyl, coming from the west, which it struck the right, its car had just continued west at the rate of twenty miles per hour. She was seriously injured, sustaining a broken family fracture, a fracture of the right ankle bone, right side, and other injuries, and she remained under the care of a physician for six days and four months. There is no dispute in the evidence as far as it relates to the question of negligence, as the defendants introduced no evidence. The material issue is the fact whether the motorman was guilty of contributory negligence, but the verdict in these respects cannot be successfully questioned.

The main defense relied on by the defendant is the claim that it was not the owner or operator of the automobile and that there is no evidence in the record upon which to make connection with the injury to the plaintiff. To most question the motorman testified that the automobile which struck plaintiff was driven by Joseph Smyl. It was a reasonable deduction, until facts are that the automobile which struck plaintiff was driven by

hauling machines for the defendant. The Singer Sewing Machine Company had a branch office at 3943 West Madison street, Chicago, selling and repairing sewing machines, managed by James A. Dwyer, employed on a salary and commission basis, devoting his entire time exclusively to the defendant's business. Duff was a solicitor and he was furnished cards of the defendant representing him to the world as its representative and it was his business to find prospects. He also did repair work. Two or three days previous to the accident, Dwyer, in the automobile involved in the accident in question, accompanied by Duff, called on customers and sold four or five sewing machines on Blaine place, and Duff solicited a job for the repair of a machine. Duff brought back a machine in this automobile to be repaired a day or two before the accident.

John Keyes, a police officer, testified that about 8 p. m., January 12, 1929, he called at the office of the Singer Sewing Machine Company on West Madison street, and there inquired of Dwyer if he had been driving an automobile about 5 p. m., and was told by Dwyer that Duff, one of his men, had been driving it; that he had been out on a business call for him; that he (Duff) was a trouble man, went out and fixed and repaired.

Joseph A. Ryan testified that Dwyer told him that Duff was in his employ, and that at the time of the accident Duff had been out on a repair job for the Singer Sewing Machine Company.

James A. Dwyer testified that Duff did the repair work for himself and not for the Singer Sewing Machine Company; that whatever Duff did was his own business; that he never told Keyes that Duff was a trouble man; that the men repaired their own machines; that the company has nothing to do with that; that he never saw Duff repair any machines in the store; that on the day of the accident he did not send Duff on a repair job; that while Duff was using the automobile he was not on any business of the Singer Sewing

Machine Company and that he did not know Duff was using the automobile that day; that Duff had asked for permission that afternoon to use the automobile to deliver a repair job he had at Blaine place, but Dwyer would not let him use the automobile and expressly told him he could not use the automobile, and that the first he knew that Duff had used the automobile was when a policeman came into the store and told him about it. He also testified that the Singer Sewing Machine Company issued business cards advising the public that it holds itself out to make repairs. He further testified that during the afternoon of January 12, 1929, he loaned the automobile to one Lawler to enable him to convey his trunk from his boarding house to the home of his (Lawler's) sister.

It is contended by defendant's counsel that the court erred in refusing to instruct the jury to find the defendant not guilty, and the defendant argues that Duff, the driver of the automobile, was not defendant's servant. The motion to instruct the jury to find the defendant not guilty raises the question whether there was any evidence which fairly and reasonably tended to show that the defendant was the owner or operator of the automobile which caused the injuries to the plaintiff. If there is evidence which fairly tends to support the plaintiff's case it must be submitted to the jury. It is a question of law whether there is any evidence tending to prove the allegations of the plaintiff's declaration, and it is a question of fact, where there is such evidence, whether it is sufficient to sustain such allegations. The former is a question for the court; the latter a question for the jury, subject to [illegible] revision by the courton motion for a new trial. Therefore, the court may not properly take the case from the jury and direct a finding for the defendant when there is some evidence tending to prove every essential allegation of the plaintiff's declaration. (Shannon v. Nightingale, 321 Ill. 168, 175.) It is a question for

the trial court whether the evidence, with all the legitimate and natural inferences to be drawn therefrom, is sufficient, if credited, to sustain a verdict. The only question which the court has to determine is whether there is in the record any evidence, which, if true, fairly tends to prove the allegations of the declaration. (Libby, McNeill & Libby v. Cook, 222 Ill. 206; Woodman v. Illinois Trust & Savings Bank, 211 id. 578; McFarlane v. Chicago City Ry. Co., 288 id. 476; Walldren Express Co. v. Krug, 291 id. 472.) Under the pleadings and the evidence in the instant case the action of the court in submitting to the jury the question whether Duff was the agent of the defendant and was acting within the scope of his employment at the time of the accident was correct.

The plea that Joseph Duff was not the servant of the defendant raises an issue of fact. (Franklin Coal Co. v. Industrial Com., 296 Ill. 329, 334.) Wherever an issue is made by the pleadings and evidence must be introduced to maintain the issue, controverted questions of fact are involved. (Havratel v. Curtis Door & Sash Co., 290 Ill. 526, 528.) This issue the jury found against the defendant. It was not necessary that plaintiff prove that Duff was a servant of the defendant by direct evidence; that fact may be proved by circumstantial evidence, that is, by proof of such circumstances as give rise to a reasonable inference in the minds of the jury of the truth of the fact alleged and sought to be proved. (U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 535.) Agency may be indirectly proven by evidence of the relative situation of the parties, or by their habit and course of dealing, or it may be implied or inferred from circumstances, and is a question for the jury. (Mabley v. Irwin, 16 Ill. App. 362, 364.) The facts that the automobile had a specially constructed platform; was used in the business of the defendant for hauling machines, and people working out of the defendant's store were permitted to use the automobile for the purpose of hauling defendant's machines; that

automobile for the purpose of hauling defendant's machines; that working out of the defendant's store were permitted to use the business of the defendant for hauling machines, and people the automobile had a specially constructed platform; the road in injury. (Hardy v. Ivanin, 18 III. App. 603, 304.) The fact that matters interposed to be given weight. It was sufficient, if evidence, to sustain a verdict. The only question that the court has to determine is whether there is in the record any evidence, which if true, fairly tends to prove the allegations of the declaration. (Libby, Burgill & Libby v. Dunn, 209 Ill. 306; Thurber v. Illinois Trust & Savings Bank, 211 id. 574; Martinek v. Chicago City Ry. Co., 208 id. 470; Talbitzer Express Co. v. Dyer, 201 id. 470.) Under the pleadings and the evidence in the instant case the action of the court in submitting to the jury the question whether Ivy was the agent of the defendant and was acting within the scope of his employment at the time of the accident was correct.

The rule that Joseph Burt was not the servant of the defendant raises an issue of fact. (Pressing Wood Co. v. Industrial Com., 296 Ill. 334, 334.) However no issue is made by the pleadings and evidence must be introduced to maintain the issue, contravened questions of fact are involved. (Stuart v. Curtis Bros. & Bush Co., 260 Ill. 288, 288.) This issue the jury found against the defendant. It was not necessary that plaintiff prove that Ivy was a servant of the defendant by direct evidence; that fact may be proved by circumstantial evidence, that is, by proof of such circumstances as give rise to a reasonable inference in the mind of the jury of the truth of the fact alleged and sought to be proved. (V. B. Berning Co. v. Hoffenberg, 211 Ill. 332, 1976.) Agency may be indirectly proven by evidence of the relative situation of the parties, or by their habit and course of dealing, or it may be inferred from circumstances, and is a question for the jury. (Hardy v. Ivanin, 18 Ill. App. 603, 304.) The fact that

Duff was a solicitor for defendant furnished with cards representing him to the world as its representative; that two or three days before the accident Duff brought a machine to defendant's store to be repaired and that the automobile was out in the street during regular business hours of the day, were circumstances affording ample basis for the inference, and tended to show that Duff was the agent of the defendant and that he was engaged in the defendant's business at the time of the accident, and upon this evidence the jury found that Duff was the defendant's servant, engaged in the business of his principal at the time of the accident, and the trial court approved this finding and in this we concur.

It is also contended that the court committed error in admitting admissions alleged to have been made by Dwyer. It appears from the record that when the motorman of the two-car train involved in the accident saw the driver escaping from the scene of his reckless conduct, he immediately took down the number of the license and gave it to a policeman. Officer Keyes, in line of his duty in attempting to locate the man guilty of such conduct, checked the list of vehicle licenses to find out the owner of the car to which said license number was issued. He went to the business place of the Singer Sewing Machine Company on West Madison street where the defendant company occupied its store and held itself out to the public for the purpose of doing business, at an hour when the store was still open. Upon his arrival at the store he saw an automobile bearing the very license number which had been given him, standing in front of the store of defendant company. He thereupon went into the place of business and there asked if the boss was in, and was answered in the affirmative, and thereupon Dwyer, the agent of the defendant in the management of the defendant's business, performing an act as such agent within the scope of his powers, informed Officer Keyes that Duff, one of his men, a trouble man, who went out and

fixed and repaired, had been driving the automobile. It also appears that Joseph A. Ryan testified that Dwyer told him that Duff was in his employ and at the time of the accident had been out on a repair job for the Singer Sewing Machine Company. We do not deem it necessary to pass on the instant contention for the reason that in any event the reception of this evidence did not constitute reversible error, as there was sufficient other evidence to prove that Duff was an agent of the defendant and was acting within the scope of his employment at the time of the accident.

Finding no reversible error in the record, the judgment of the Superior court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

35525

ELIZABETH RYAN,
(plaintiff),
Appellee,

v.

SINGER SEWING MACHINE CO.,
Inc., (defendant),
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

266 I.A. 612[4A]

ADDITIONAL OPINION ON PETITION FOR REHEARING.

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Defendant has filed a petition for a rehearing in which it is alleged that the court misconceived the import of the facts, and its counsel argues that the circumstantial evidence in this case did not warrant the trial court in submitting the case to the jury. That the circumstantial evidence only raises presumptions and that presumptions fall in the face of facts. (Lohr v. Barkmann Cartage Co., 338 Ill. 338, 340.) Counsel then proceeds to argue each item of circumstantial evidence separately, disregarding all of the others; for example, he argues that the fact that the automobile had been used in transporting used machines of the defendant company, is not prima facie proof that on the date of the injury to the plaintiff the automobile was being used on business of the defendant. That fact alone might not be sufficient to permit the case to go to the jury, but when taken with all the other circumstantial evidence, it was entitled to be considered by the jury. So also, he argues, the fact that the automobile had a specially constructed platform and was used for hauling machines for the defendant, was no evidence and created no inference that it was being used at the time of the accident on the business of the defendant. That fact alone

evidence on the business of the defendant. That fact alone created no inference that it was being used at the time of the [illegible] used for packing machines for the defendant, nor to authorize any [illegible] that the automobile had a specific commercial [illegible] was entitled to be considered by the jury. In view, he argues, the jury, but when taken with all the other circumstantial evidence, it [illegible] fact might not be sufficient to permit the case to go to the [illegible] still the automobile was being used on business of the defendant. That is not [illegible] proof that at the time of the injury to the plaintiff [illegible] had been used in transporting used machines of the defendant company, [illegible] of the others; for example, he argues that the fact that the automobile each item of circumstantial evidence separately, disregarding all [illegible] Carbon v. Baltimore Carriage Co., 219 Ill. 323, 326.) Counsel then proceeds to argue and that presumptions fall in the face of facts. (Ogden v. Bateman [illegible] jury. That the circumstantial evidence may raise presumptions case did not warrant the trial court in submitting the case to the and its counsel argues that the circumstantial evidence in this it is alleged that the court misconceived the import of the facts, Defendant has filed a petition for a rehearing in which

Mr. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

[illegible] COMMERCIAL CASUALTY INSURANCE CO.

Appellant,

v.

[illegible] MOTOR SALES CO.,
(Plaintiff),

Appellee.

APPEAL FROM THE [illegible]

[illegible] COUNTY.

[illegible] PRESIDING.

Mr. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Defendant has filed a petition for a rehearing in which it is alleged that the court misconceived the import of the facts, and its counsel argues that the circumstantial evidence in this case did not warrant the trial court in submitting the case to the jury. That the circumstantial evidence may raise presumptions and that presumptions fall in the face of facts. (Ogden v. Bateman Carriage Co., 219 Ill. 323, 326.) Counsel then proceeds to argue each item of circumstantial evidence separately, disregarding all of the others; for example, he argues that the fact that the automobile had been used in transporting used machines of the defendant company, is not [illegible] proof that at the time of the injury to the plaintiff the automobile was being used on business of the defendant. That fact alone might not be sufficient to permit the case to go to the jury, but when taken with all the other circumstantial evidence, it was entitled to be considered by the jury. In view, he argues, the [illegible] that the automobile had a specific commercial [illegible] used for hauling machines for the defendant, nor to authorize any [illegible] created no inference that it was being used at the time of the

might not be sufficient to permit the case to go to the jury, but when taken with all the other circumstantial evidence it was entitled to be considered by the jury. He also argues that the fact that Duff was a solicitor for defendant gave him no authority to drive the automobile and was no proof, directly or inferentially, that while driving the automobile he was doing so as the agent of the defendant. Again we agree that that fact alone might not be sufficient to permit the case to go to the jury, but when taken with all the other circumstantial evidence it was entitled to be considered by the jury. In Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, 6, (certiorari denied by the Supreme Court) we said: "Circumstantial evidence is the proof of certain facts and circumstances in a given case from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind. (Citing cases.) In criminal as well as in civil cases a verdict may be founded on circumstances alone. (Citing cases.) A greater or less probability, leading, on the whole, to a satisfactory conclusion, is all that can reasonably be required to establish controverted facts. (Citing cases.)"

After a reconsideration of all the facts we are of the opinion that there was sufficient evidence entitling the cause to be submitted to the jury. Moreover, the jury were not bound to accept Dwyer's uncorroborated testimony, that while Duff was using the automobile he was not on the business of the defendant. (D'Aleria v. Shirey, 286 Fed. 522; Stuart v. Doyle, 112 Atl. 653, 656.) The jury were not bound to accept the testimony as true merely because there is no direct testimony contradicting it if it contained such inherent improbabilities or contradictions as alone, or in connection with other circumstances in evidence, satisfied them of its falsity. (Podolski v. Stone, 186 Ill. 540, 547, 548.)

The petition for a rehearing is denied.

PETITION FOR REHEARING DENIED.

Gridley, P. J., and Scanlan, J., concur.

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35562

HYMEK N. HOWELL,
(plaintiff),
Appellee,

v.

MAX DIETZ,
(defendant),
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

266 I.A. 612

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Action was brought by plaintiff to recover on an account stated. Tried before a jury, a verdict for plaintiff for $1,000 and judgment on the verdict, from which defendant appealed. The plaintiff has not appeared or filed a brief in this court.

The amended statement of claim alleged that an accounting was had between the plaintiff and the defendant on May 30, 1928, and that at such time defendant promised and agreed to pay plaintiff within sixty days $1,000 with interest. Defendant in his affidavit of merits denied that an accounting was had between him and the plaintiff on May 30, 1928, or at any other time, and that he promised to pay plaintiff $1,000 or any other sum.

Plaintiff introduced no evidence to prove the items of account, but relied solely on an account stated, and it appears from his testimony that he and the defendant have known each other about thirty years; that prior to 1927, defendant became financially interested in the Lansing-Calumet Real Estate Improvement Company and the Acme Oil Corporation, both of which became financially embarrassed, of which fact defendant advised plaintiff and requested plaintiff to assist him in his difficulties and to take hold of his affairs, which plaintiff did, and on May 30, 1928, the parties met and discussed the amount due plaintiff from defendant as compensation

35563

[illegible],
(plaintiff),
Appellee,

v.

[illegible],
(defendant),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

296 I.A. 612

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Action was brought by plaintiff to recover on an account stated. Tried before a jury, a verdict for plaintiff for $1,000 and judgment on the verdict, from which defendant appealed. The plaintiff has not appeared or filed a brief in this court.

The amended statement of claim alleges that an accounting was had between the plaintiff and the defendant on May 30, 1930, and that at such time defendant promised and agreed to pay plaintiff within sixty days $1,000 with interest. Defendant in his affidavit of merits denied that an accounting was had between him and the plaintiff on May 30, 1930, or at any other time, and that he promised to pay plaintiff $1,000 or any other sum.

Plaintiff introduced no evidence to prove the items of account, but relied solely on an account stated, and it appears from his testimony that he and the defendant have known each other about thirty years; that prior to 1927, defendant became financially interested in the Lansing-Calumet Real Estate Improvement Company and the Lane Oil Corporation, both of which became financially embarrassed, of which fact defendant advised plaintiff and requested plaintiff to assist him in his difficulties and to take hold of his affairs, which plaintiff did, and on May 30, 1930, the parties met and discussed the amount due plaintiff from defendant as compensation

for the services rendered by plaintiff to defendant, and that at this conversation it was agreed that defendant would pay plaintiff $1,000 for the services.

Defendant testified he never promised plaintiff to pay him $1,000 or any other sum on May 30, 1923, or at any other time, and that he never had any conversation with plaintiff regarding services he was to render for him and that he was never in any financial difficulty.

It is contended that the court erred in its ruling on the admission of evidence, particularly in excluding a receipt for $350 signed by plaintiff, and certain stock certificates issued by the Acme Oil Corporation. Neither the receipt, the certificates nor copies thereof appear in the record, and it does not appear what bearing they had upon the question in issue. It is also claimed the court erred in admitting a note for $1,000, executed by the Acme Butter Corporation, payable to defendant, which it was claimed by plaintiff was given to him by the defendant at the conversation at which the account was stated; also exhibits tending to show that plaintiff commenced suit upon the note against the Acme Butter Corporation. These exhibits tended to corroborate the plaintiff's theory. The court did not err in its rulings, in excluding the receipt and stock certificates and in admitting the note and the other exhibits.

The defendant also argues that statements of plaintiff's counsel at the commencement of the trial requesting certain original documents claimed to be in the possession of the defendant, and other remarks of plaintiff's counsel and certain comments of the court were improper and prejudicial. It appears that plaintiff served notice for the production of these documents and that defendant's attorney denied that they were ever in the possession of the defendant or

for the business conducted by Plaintiff in Switzerland, and that of $17,000 for the vacations.

Defendant admitted to owing Plaintiff in back pay $17,000 or any other sum on July 30, 1969, or at any other time, and that he never had any conversation with Plaintiff indicating that he was to receive for him and that he was to receive any additional compensation.

It is assumed that the above stated is the burden of the evidence, particularly in connection with Plaintiff's claim for $900 claimed by Plaintiff, and contains about conflicting issues of fact.

Neither the jurors, the courts, nor is there any other basis upon which Plaintiff was given to rise by the defendant at the conversation Butler Corporation, perhaps to customers, which it was claimed by the court stated in admitting a note for $17,000, concerned by the jurors bearing that upon the question in issue. It is also claimed that there existed a note for $17,000 concerned by the jurors Butler Corporation. There existed nothing to corroborate the Plaintiff's theory. The court did not err in its ruling, in excluding the testimony and also excluding and in admitting the note and the other exhibits.

The defendant also claims that statements of Plaintiff's counsel at the commencement of the trial reduced certain evidence to be in the possession of the defendant, and after admitted by Plaintiff's counsel was entirely unnecessary to prove the matter.

that they ever were in existence. No objection was made by defendant to the request for these documents, nor does it appear that the request was made in the presence of the jury. We have carefully considered the argument of defendant's counsel and examined the record and find nothing therein which would warrant a reversal of the cause.

It is finally contended, that the verdict and judgment is not supported by the evidence. In an action upon an account stated the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained. (Throop v. Sherwood, 4 Gilman 92.) The question whether there was an account stated was a question for the jury. There was a clear conflict in the evidence, and under such circumstances it is the peculiar province of the jury to determine the preponderance and credibility of the evidence. Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears to be equally credible, a court of review is not warranted in disturbing the verdict of the jury, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the weight of the evidence. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review. (Mills & Co. v. Duke, 232 Ill. App. 277, 280; Marble v. Marble,

(Mills & Co. v. Yale, 120 Ill. App. 347, 1905; Murphy v. Murphy,
mine the study of the matter in connection with a count of malice.
standing. They are in a much better position to make determi-
nations, their manner of testifying and a thousand subtle circum-
stances, which cannot be reported to the court by a typed page of
what others have said - the demeanor of the witnesses - the
mind should direct a jury's attention to the fact to them alone it
matter it is clearly defined the duties of its relations. Upon the
jury, because under the law this question of the credit of a jury
court of review is not authorized to disturb the verdict of the
of the printed page of the record, although to be clearly erroneous, a
one witness has contradicted a number witness who, from the testimony
the uncertainty point in the case is subjected to the credibility of
determine the truthfulness and credibility of the witness. Upon
mon circumstances is in the sitting jury of the jury to

CONT'

the jury. There was a close conflict in the evidence, and under
to put the defense contention. (Cooley v. Peterson, 4 Illinois 24.)
The question whether there was an account stated was a question for
is found, and when the original contract, and upon the question
of action, and is in the nature of a new undertaking. The waiver
for the setting of the account changes the character of the cause
rected the original term or existence of the debt in controversy,
is not abandoned by the waiver. In an action upon an account
is formally abandoned, that the waiver and indulgence
a tendency of the cause.

examined the record and find nothing therein which would warrant
essentially committed the statement of defendant's counsel and
step the reversal was made in the discretion of the jury. We have
defendant in the instant for whose conscience, nor does it appear
that they were in existence. In addition was made by

304 Ill. 229; Illinois-Indiana Fair Association v. Phillips, 241 Ill. App. 454.) After examining and considering the testimony, we are of the opinion that we would not be warranted in holding the verdict is contrary to the manifest weight of the evidence.

We think none of the errors assigned calls for a reversal of the judgment and accordingly it is affirmed.

AFFIRMED.

Gridley, P. J., and Seanlan, J., concur.

110 A

35578

J. F. BRENNAN, F. S. ALSTRIN, C. GROVERMAN ELLIS, L. M. SPITZGLASS, S. B. ULLMAN, C. C. TAYLOR, HENRY STAFANY, L. M. STEIN, B. F. STEIN, doing business as STEIN, ALSTRIN & CO., (plaintiffs),
Appellees,

v.

J. N. PERSICHILLI,
Defendant.

THE NATIONAL BANK OF THE REPUBLIC OF CHICAGO, a corporation,
Garnishee.

M. N. ELSENAU COMPANY and HARRIS TRUST AND SAVINGS BANK,
Interveners.

M. N. ELSENAU COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

266 I.A. 613

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This appeal by M. N. Elsenau Company was consolidated by agreement with appeal No. 35577 by Harris Trust and Savings Bank, where the facts are identical and where in an opinion this day filed the judgment appealed from was reversed and a judgment entered in this court against The National Bank of the Republic of Chicago, a corporation, as garnishee, for $11,000 in favor of the Harris Trust and Savings Bank, and $1,000 in favor of the appellees, and it was also adjudged that M. N. Elsenau Company take no part of the funds. Our judgment in that case (No. 35577) disposes of this appeal.

Gridley, P. J., and Scanlan, J., concur.

2561.A.613

1. J. ANDREWS, P. L. ELLIS,
6. GOODYEAR RUBBER, C. N.
RUPPERT, E. J. MILLER,
C. O. TAYLOR, HENRY TAYLOR,
I. M. ELKIN, E. J. CHEIN, doing
business as ELKIN, ALDRICH & CO.,
(plaintiffs)

Appellees,

v.

1. B. MONTGOMERY,

Defendant,

AMICUS BRIEF

COUNSEL NAMES,

COUNSEL CONTACT,

THE NATIONAL BANK OF THE REPUBLIC
OF CHICAGO, a corporation,
Garnishee.

H. H. KINSEAY COMPANY and
HARRIS TRUST AND SAVINGS BANK,
Intervenors,

E. E. KLEPSAD CHEVRAT,
Appellant.

MR. JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT.

This appeal by M. T. Clement Company was controlled by
agreement with appeal no. 13577 by Harris Trust and Savings Bank.
Since the facts are identical and there is no opinion this filed
the judgment appealed from was reversed and a judgment entered in
this cause against The National Bank of the Republic of Chicago, a
corporation, as Garnishee, for $17,000 in favor of the Harris Trust
and Savings Bank, and $1,000 in favor of the intervenor, and it was
also ordered that H. H. Klemsen Company take no part of the funds
due judgment in that case (No. 13577) pursuant of this opinion.

Reversed; F. J., one dissenter, J., absent.

35599

GENERAL ACCEPTANCE COMPANY,
a corporation,
(plaintiff),
Appellee,

v.

J. B. GILLUM,
(defendant),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

266 I.A. 613[2]

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

A judgment by confession was rendered in favor of plaintiff and against defendant for $699, which included the amount due on the note by its terms, and $75 attorney's fees. It was based upon a promissory note, with the usual power of attorney to confess judgment, and purports to be signed by the defendant and Nora Gillum. It is dated May 7, 1927, and is payable to the order of Prudential Const. Co. for $624, in monthly installments, at the office of General Acceptance Company. Printed on the back of the note is the following: "without recourse, pay to the order of General Acceptance Company," and underneath this is the name of the payee. The judgment, on defendant's petition, was opened up and the defendant was given leave to defend. On a hearing before the court the judgment was confirmed. This appeal followed.

The defendant contends that plaintiff is barred from prosecuting its action because of a former judgment between the same parties concerning the same subject matter. This is the second appearance of the case in this court. March 2, 1931, (General Acceptance Co. v. Gillum, No. 34756, 260 Ill. App. 623) the first division of this court filed an opinion in which it said that the record is in an unsatisfactory condition, and whether the former judgment

266 I.A. 613

record is in an unsatisfactory condition, and whether the former judgment

ciation of this court filed an opinion in which it was said that the

Assignment Co. v. Gilkey, No. 14706, 200 Ill. App. 422) the first

appearance of the case in this court. March 6, 1922. (Central

practice concerning the same subject matter. This is the second

preserving the motion because of a former judgment between the same

The defendants contends that plaintiff is barred from

was confirmed. This appeal follows.

given leave to defend. In a hearing before the court the judgment

ment, on defendant's petition, was opened up and the defendant was

Company," and underneath this is the name of the bank. The judg-

following: "without recourse, pay to the order of General Acceptance

General Acceptance Company." Printed on the back of the note is the

Corp. for $684, in monthly installments, at the office of

It is dated May 7, 1923, and is payable to the order of Peninsula

judgment, and purports to be signed by the defendant one year after

a promissory note, with the usual power of attorney to confess

in the note by its terms, and $75 attorney's fees. It was issued upon

trial was against defendant for $684, which included the amount due

A judgment by confession was rendered in favor of plain-

MR. JUSTICE EDWARD J. DUNNE DELIVERED THE OPINION OF THE COURT.

appellee,

v.

J. B. GILKEY,
(defendant),

appellant.

(plaintiff),
a corporation,
GENERAL ACCEPTANCE COMPANY,

ABSTRACT BOOK CORRECTED
Order of Court.

25620

was res judicata was a question to be decided when all the evidence is received, and the cause was reversed and remanded for a new trial.

It is undisputed that on September 30, 1927, in case No. 1834996, Municipal court of Chicago, the plaintiff secured a judgment against J. B. Gillum and Nora Gillum, his wife, by confession upon the identical note involved in the instant case, and that on March 18, 1929, leave was given the defendants in that case to defend. October 10, 1929, in that case there was a trial by the court. At the hearing J. B. Gillum and Nora Gillum claimed three grounds of defense: (1) that the note was not signed by them; (2) that they entered into a contract with the Prudential Const. Co. to erect an enclosed porch, that work was begun under this contract but has not been completed and that such work as has been done was not done in a good and workmanlike manner, as called for under the terms of the contract; (3) that plaintiff was not an innocent purchaser of the note. The court found the issues against the plaintiff, the judgment of September 30, 1927, was set aside and a judgment entered against the plaintiff for costs. November 6, 1929, the trial court found as a fact that the said judgment note upon which the judgment by confession had been entered bears the genuine signature of J. B. Gillum, but that it does not bear the genuine signature of Nora Gillum, and that her name was placed on said note without her consent or knowledge.

It is upon this state of the record that the defendant in the instant case claims the plaintiff is barred from prosecuting its suit.

It is a well established rule that where the subject matter of a cause of action has been once determined by a final judgment in a court of competent jurisdiction, another suit cannot be maintained between the parties. Plaintiff concedes the rule but claims there was no adjudication against J. B. Gillum because the court found that the signature of Nora Gillum was spurious, and this being so the judgment

the signature of Zara Gillam was effective, and this point to the judgment
was no adjudication against J. B. Gillam leaving the court found that
between the parties. Plaintiff concedes the rule but claims there
a court of competent jurisdiction, whether fully exercise be maintained
of a cause of action has been once determined by a final judgment in

It is a well established rule that where the subject matter
instant case claims the plaintiff is barred from prosecuting its suit.

It is upon this proof of the record that the defendant in the
without her consent or knowledge.
signature of Mora Gillam, and that has made her please on said note
genuine signature of J. B. Gillam, but that it does not bear the genuine
note upon which the judgment by confession was made bearing the
November 6, 1929, the trial court found as a fact that the said judgment
set aside and a judgment entered against the plaintiff, the court
issue against the plaintiff, the judgment of September 30, 1927, was
still was has an innocent purchaser of the note. The court found the
maker. At trial for which the terms of the contract (3) that plain-
each work as has been done was not done in a good and workmanlike
work was begun under this contract but has not been completed and that
tract with the Furniture Comp. Co. It cost an unpaid sum. that
that the note was not signed by them (2) that they entered into a con-
1. B. Gillam and Mora Gillam signed three promis of defendant (1)
10, 1929, in that sum there was a trial by the court. If the morning
1929. Leave was given the defendants to that date to defend. Default
ageinst J. B. Gillam and Mora Gillam, his wife, in condemnation plan
the identical note involved in the instant case, and date on March 12,
1929. Municipal court of Chicago, the plaintiff brought a judgment
It is undisputed that on September 30, 1927, in open Ct,
was Zara Gillam was a question to be decided upon all the evidence
is received, and the cause was received and remanded for a new trial.

by confession against J. B. Gillum could not stand. Plaintiff's counsel would have us say that the only question decided by the court in case No. 1834996 was that the note was, as a matter of fact, signed by J. B. Gillum and that it was not signed by Nora Gillum. This we are unable to do for the reason that the defendants in that case claimed other defenses. The doctrine of res judicata embraces not only what has actually been determined, but also extends to any other matter properly involved, and which might have been raised and determined. (Rogers v. Higgins, 57 Ill. 244; Bacon v. Reichelt, 272 Ill. 90, 94.) "The value of a plea of former recovery is not to be determined by the reasons, which the court rendering the former decree or judgment may have given for doing so. * * * Nor is such former judgment or decree conclusive only as to questions actually and formally litigated. It is conclusive as to all questions within the issue whether formally litigated or not." (Harmon et al. v. Auditor of Public Accounts et al., 123 Ill. 122, 133.)

For the reasons indicated the judgment of the Municipal court of Chicago is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

Bentley, 2. 1., may continue, ... counsel.

...court of Claims is reversed.

...For the reasons indicated the judgment of the District

...by..." 123 III. 1523, 316.)

...litigate or not." (Hagner et al. v. Valley of Rogue Indepen-

...only as to questions actually and formally litigated. If there

...during or * * * that is such former judgment or decree conclusive

...court restricting the former decree or judgment may later given for

...former recovery is not to be determined by the reasons, which the

...Dacon v. Bentley, 273 Ill. 82.) "The value of a plea of

...have been ruled and determined. (Hagner v. Valley, 2 Ill. 316.

...also extend to any other matter properly involved, and which might

...Judgments embrace not only what was actually been determined, but

...ence in that case claimed other defenses. The doctrine of res

...Claim. This is one reason to do for the reason that the defend-

...fact, plead by 1. R. Claim and that it was not plead by Dace

...court in case No. 123888 and that the note was a matter of

...counsel would have no duty than the only question decided by the

...by counterclaim against P. R. Claim could not stand. Plaintiff's

35622

FRED W. RENTZ and
AUGUSTA RENTZ,
(plaintiffs),
Defendants in Error,

v.

WILLIAM E. MEYERS and GEORGE
J. JANK, doing business as
W. E. MEYERS & CO.,
(defendants),
Plaintiffs in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

266 I.A. 613

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action on the case against the defendants to recover damages in connection with a certain exchange of real estate, in which the defendants were brokers. A plea of not guilty was filed, the cause was called for trial, defendants not appearing a jury was impaneled, a verdict was returned for $9,820, and judgment rendered on the verdict against defendants, for a reversal of which they sued out this writ of error.

It is contended that the declaration did not state a cause of action. It alleged in substance that plaintiffs were at and prior to September 14, 1923, the owners of certain described real estate in Chicago, Illinois, and defendants were engaged in the business of selling real estate on commission; that defendants solicited plaintiffs to trade their equity in said property for a farm in the State of Wisconsin; that to induce the parties to enter into a contract of exchange, defendants falsely and fraudulently represented that Charles A. Kufahl was the owner of said Wisconsin farm; that it was worth $45,000 and that there was an incumbrance of $15,000 against the land, well knowing such representations were untrue; that plaintiffs relying on such representations, executed

35803

7.

Defendants in Error.

Plaintiff in Error,

(defendants).

1. JACK, doing business as
N. K. MOVING & CO.,

-ILLIAM C. [illegible] and GEORGE

(plaintiffs),

-ARIA MEAD,

-ARY E. MEAD and

266 I.A. 613

Error to Circuit Court,

Cook County.

a certain alleged contract of exchange on condition that it be executed and accepted by Kufahl within twenty-four hours; that Kufahl was not the owner of said Wisconsin property; that the property was not worth $45,000; that Kufahl refused to sign said alleged contract within twenty-four hours, but made a counter proposition to plaintiffs, which they refused to accept, and then many days after said Kufahl signed said alleged contract, and defendants recorded same in the recorder's office of Cook county, Illinois, on September 21, 1923, that October 11, 1923, plaintiffs, through their attorney, sent the defendants a copy of the opinion of title to said premises, and on October 26, 1923, a supplementary opinion of title pointing out said defects in the title, and on October 31, 1923, a letter to the defendants pointing out the defects in the title to the premises in Wisconsin and the fraudulent representations of defendants and rescinded said alleged agreement; that thereafter the plaintiffs turned over to other real estate agents their said property for sale and they procured a bona fide purchaser therefor, ready, willing and able to give to the plaintiffs $10,000; that plaintiffs called then upon the defendants to release said alleged contract to them as a cloud on their title and to remove the same as a cloud from the records of the office of the recorder of Cook county, Illinois, and informed them then and there that they had an offer to purchase the property; that the defendants refused to release said contract and plaintiffs were not able to make the deal satisfactory to said purchaser by reason of said refusal, and to release said contract from records, and thereby lost said sale.

The declaration further alleged that said property was subject to a first mortgage of $55,000 and accrued interest, a second mortgage of $16,950 and accrued interest, and a third

second mortgage of $14,500 was obtained therefrom, and a third mortgage of $14,000 was obtained from Goodwin, et al, leaving a net equity of $14,000 in the property. [illegible] the defendants refused to release said collateral and Plaintiff avers that they did so with the intent to make the deal sufficiently to avoid payments on account of said release, and to prevent said collateral from [illegible], et al, [illegible] to said property.

The declaration further alleged that said Defendants [illegible] to said note.

[illegible] Plaintiff avers that Defendants [illegible] and not the owner of said property [illegible] that the said [illegible] owned said property [illegible] and that Defendants [illegible] Plaintiff avers that [illegible] a certain alleged contract of exchange in which it is

mortgage of $3,750 and accrued interest, and certain chattel mortgages on furniture in said premises; that the plaintiffs were behind in the interest payments at said time and the mortgages were to be foreclosed, which facts the defendants then and there knew; and said defendants also knew the plaintiffs must sell at once or lose everything, and the plaintiffs did sell at the best price they were able to obtain and received net from said premises $180 cash and a contract for an equity in a Michigan farm which was worth nothing above its incumbrances.

The rule is that where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict. (C. & E. I. R. R. Co. v. Hines, 132 Ill. 161; Consolidated Coal Co. v. Scheiber, 167 id. 539; Paden v. C. B. I. & P. Ry. Co., 276 id. 62.) If the declaration in the instant case can stand this test the point must be overruled. The declaration must allege all the circumstances necessary for the support of the action, and if any act is to be done by the plaintiffs before the accruing of the defendants' liability the performance of that act must be averred. If the declaration is so defective that it will not sustain the judgment, such defect may be taken advantage of on motion in arrest of judgment or on error.

This case is between the plaintiffs and the persons alleged to have solicited the plaintiffs to sign the contract. Kufahl, the other party to the contract, is not a defendant to the case. The charge against the defendants is that they refused to execute a re-

lease of the contract. The release to be of any value must be signed by Kufahl. There is no allegation that plaintiffs requested Kufahl to execute a release or that Kufahl refused to do so, or that it lay in the power of the defendants to execute a release, in other words, it failed to allege a fact, the existence of which was necessary to entitle the plaintiffs to recover, and under such circumstances the declaration does not state a cause of action (Beveridge v. Illinois Fuel Co., 283 Ill. 31; Walters v. City of Ottawa, 240 Ill. 259; Hansberry v. Holloway, 332 Ill. 334), and where no cause of action is stated, the omission to allege essential facts is not cured by verdict. (Sargent Co. v. Baublis, 215 Ill. 428.)

The judgment of the Circuit court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

issue of the contract. The reliance to be of such value that be
signed by Kufahl. There is no allegation that plaintiff requested
Kufahl to execute a release or that Kufahl refused to do so, or that
it lay in the power of the defendants to execute a release. In other
words, it failed to allege a fact. The existence of which was necessary
to entitle the plaintiff to recover, and under such circumstances
the declaration does not state a cause of action (Greenidge v. Illinois
Trust Co., 289 Ill. 91; Indiana v. City of Chicago, 290 Ill. 329;
Masterson v. Bellmont, 292 Ill. 454), and there is room of course in
statute, the meaning to allege material facts is not cured by ver-
dict. (Gerard Co. v. Dowling, 212 Ill. 488.)

The judgment of the circuit court will be reversed and
the cause remanded.

REVERSED AND REMANDED.

Brindley, P. J., and Jamison, J., concur.

35658

CHRISTIAN GROSS,
(complainant),
Appellee,

v.

VIRGINIA R. H. GROSS,
(defendant),
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 613[4]

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill for divorce on the ground of desertion and alleged that there were two minor children of the marriage of the parties and prayed for their custody. Service was had by publication and the default of the defendant was entered on August 8, 1930, granting complainant a divorce, and in the decree the chancellor found that there were born to the parties two minor children, Peter and Barbara, and that it was for the best interests of said children that their care, custody and education be given to and vested in the complainant, and it was adjudged that a pretended separation agreement entered into between the complainant and the defendant was illegal and void and against public policy. To review only that part of the decree adjudging that the separation agreement was illegal and void the defendant sued out a writ of error. This court on May 19, 1931, reversed that decree and remanded the cause to the Superior court with instructions to amend the decree by striking therefrom the paragraph relating to the pretended separation agreement. (Gross v. Gross, 34768, opinion not published.) June 11, 1931, the defendant presented the mandate of this court to the chancellor of the Superior court, and on August 20, 1931, the defendant having entered her general appearance submitted for entry an amended decree

256 I.A. 613

entered per formal observances complaint for entry on records actions
of the Superior court, and on August 30, 1922, the defendant having
the defendant personally the records of this cause to the Commissioner
thereon the personally relating to the proposed corrective adjust-
ment. (Order v. Order, 24/28, opinion not published.) June 17, 1922,
to the Superior court with instructions to amend the decree by striking
This cause on May 17, 1922, reverse that decree and remanding the cause
agreement and affirmed and void the defendant case out a suit of error.
To review only that part of the decree adjudging that the corporation
and the defendant was affirmed and void and against public policy.
tended education agreement entered into between the corporation
to and vested in the complainant, and it was adjudged that a pe-
of said shipped that their card, stocks and dividends be held
obligation, Peter and Barbara, and that it was for the best interests
the chancellor found that there were two to the parties the other
ped by purification and the decree of the Circuit and entered on
August 8, 1922, granting complainant a divorce, and in the decree
marriage of the parties and held for their custody. Before the
decretive and alleges that there were two minor children of the

complainant filed his bill for divorce on the ground of

Clerk's Office,
(complainant),
Appellee,
v.
ALEXANDIA P. K. Order,
(defendant),
Appellant.

in conformity with this court's said mandate. The chancellor thereafter, on September 9, 1931, upon petition of the complainant and notice to defendant's solicitor and upon the testimony of the complainant, amended said decree of divorce by adding thereto the finding that there was a third minor child of the parties named Anna, born in New York city on May 1, 1928, who is not now and never has been within the jurisdiction of the State of Illinois, and decreed that the question of the custody of Anna be reserved for further consideration and order, provided such child be within the State of Illinois, and perpetually enjoined the complainant from in any way attempting in any court of the State of Illinois to secure the custody of said child until such time as the child be personally within the jurisdiction of the State of Illinois. To reverse this decree defendant has appealed.

The defendant contends that the decree appealed from is void, first, because the court was without jurisdiction to enter the decree; second, even if the court had jurisdiction the trial court conducted the hearing improperly.

The only question necessary to be now considered presented by this record is, Did the court have jurisdiction to enter the decree appealed from? The petition of complainant upon which the decree of September 9, 1931, was entered alleged inter alia, that on July 3, 1930, he filed a bill for divorce and on August 8, 1930, a decree for divorce was entered against the defendant ex parte; that when he filed his bill he represented to the court that he was the father of two children, Peter and Barbara; that the Superior court granted him the divorce and custody of the two children; that at the time of the filing of the bill and at the time of the entry of the decree he was not aware of the birth of a third child and that defendant fraudulently concealed from him the birth of a child

in conformity with this court's said mandate. The chancellor thereafter, on September 3, 1931, upon petition of the complainant and notice to defendant's solicitor and upon the testimony of the complainant, amended said decree of divorce by adding thereto the finding that there was a third minor child of the parties named Anna, born in New York city on May 1, 1925, who is not now and never has been within the jurisdiction of the State of Illinois, and decreed that the question of the custody of Anna be reserved for further consideration and order, provided such child be within the State of Illinois, and perpetually enjoined the complainant from in any way attempting in any court of the State of Illinois to secure the custody of said child until such time as the child be personally within the jurisdiction of the State of Illinois. To reverse this decree defendant has appealed.

The defendant contends that the decree appealed from is void, first, because the court was without jurisdiction to enter the decree; second, even if the court had jurisdiction the trial court conducted the hearing improperly.

The only question necessary to be considered presented by this record is, Did the court have jurisdiction to enter the decree appealed from? The petition of complainant upon which the decree of September 3, 1931, was entered alleged inter alia, that on July 2, 1930, he filed a bill for divorce and on August 5, 1930, a decree for divorce was entered against the defendant ex parte; that when he filed his bill he represented to the court that he was the father of two children, Peter and Barbara; that the Superior court granted him the divorce and custody of the two children; that at the time of the filing of the bill and at the time of the entry of the decree he was not aware of the birth of a third child and that defendant fraudulently concealed from him the birth of a child

born May 1, 1928, named Anna; that the first knowledge he had of the birth of said child was May 28, 1931; that in August of 1930, he established a trust fund to be payable on his death to his children, and that if said child Anna is his child, she is entitled to share in the trust fund; that if the court had known of the existence of said child Anna, the decree of divorce would not have been entered without provision for her custody and support, and prayed the court to inquire into the parentage of said child to determine who is her father and that the court set aside the divorce decree on the ground of the concealment of the birth of said child.

The final decree of divorce was entered August 8, 1930, in the August term. No order of the court appears to be entered at that time or at the next term, to modify or vacate that decree. The decree was under the control of the court during the August term at which it was rendered, and during the September term (Par. 111, Ch. 37, Cahill's Illinois Revised Stats. 1931, p. 921), and might have been set aside or vacated during those terms, or subsequently upon motion made during those terms, and continued to a subsequent term. After these terms had elapsed the court was wholly without power to set aside, vacate, modify or annul the decree. "After a term has elapsed a decree may be corrected, on motion, in matters of form or mere clerical errors." (Tonetti Brewing Co. v. Koehler, 200 Ill. 369, 372; Totten v. Totten, 299 id. 43; McIntosh v. Closs, 304 id. 620; Velde v. Schrock, 253 Ill. App. 274, 285.) The ground on which the complainant sought to set aside the divorce decree was the concealment of the birth of the child Anna, or in other words, newly discovered evidence. A petition for rehearing on the ground of newly discovered evidence must be invoked prior to the adjournment of the court for the term. (Elzas v. Elzas, 183 Ill. 160.) The proper method of impeaching and setting

terms

aside a decree after the term is to file an original bill in the nature of a bill of review, when such decree may be set aside, reversed or modified, according to the equities of the parties. (Adamski v. Wieczorek, 170 Ill. 373; Elzas v. Elzas, 183 id. 160, 162.) The petition filed by complainant upon which the decree of August 8, 1930, was vacated, and the decree of September 9, 1931, entered, was not a bill of review. (Tobias v. Tobias, 193 Ill. App. 95.)

The decree of August 8, 1930, being in full force and effect the Superior court was without power to enter the decree of September 9, 1931, and it follows that the decree was erroneously entered. It is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

make a decree after the term is to file an original writ in the
nature of a writ of review. Such rule therein may be set aside,
reversed or modified, according to the equities of the parties.
(Stewart v. Timmerman, 170 Ill. 378; Ellis v. Ellis, 162 Ill.
168.) The petition filed by complainant upon which the decree of
August 8, 1930, was rendered, and the decree of September 9, 1932,
entered, was not a bill of review. (Ophir v. Ophir, 320 Ill.
App. 88.)

The decree of August 9, 1930, being in fact void and
after the objection came and without power to enter the decree
of September 9, 1932. Nor is Public Act 387 the decree was erroneously
entered. It is reversed.

Pritzka, P. J., and Hamlin, J., concur.

35471

CHARLES C. HYDE, ABRAHAM J. HENNINGS, IRA E. WESTBROOK, CHARLES H. WATSON, SAMUEL G. STEPHENSON, CARLYLE M. KEYES, JOSEPH McCORMACK, MARCUS R. HART, co-partners doing business under the name and style of HYDE, HENNINGS, WESTBROOK and WATSON,
Appellants,

v.

TEMPLETON, KENLY & COMPANY, Limited, a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

266 I.A. 614

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in assumpsit was brought by the plaintiffs, attorneys at law, to recover the reasonable value of services alleged to have been rendered the defendant in connection with its 1918 and 1919 federal income and excess profits taxes. There was a trial before the court, with a jury, and a verdict returned finding the issues in favor of the defendant. Judgment was entered upon the verdict and the plaintiffs have appealed.

The case went to the jury on the first count of the amended declaration, which alleges:

"That the plaintiffs together with Frederick A. Thulin were co-partners practicing law in the City of Chicago under the name of Hyde, Hennings, Thulin, Westbrook and Watson during the period from May 1, 1922, to August 5, 1929; that on last said date said co-partners orally agreed that said firm should thenceforth continue under the name of Hyde, Hennings, Westbrook and Watson; that said Thulin should withdraw as a partner; that his withdrawal should in no wise discontinue said co-partnership; that in accordance with said agreement said Thulin thereupon withdrew and that plaintiffs from thence hitherto continued said law practice of said co-partnership and succeeded to all the assets and business of said co-partners; that on the 5th day of August, 1929, plaintiffs became and now are the owners of all unpaid claims of said firm for compensation for legal services of said co-partnership; that on said date said Thulin, for a valuable consideration assigned and transferred to plaintiffs all his right in said co-partnership

2661A.614

assets, including all his right, title and interest in and to the claim for compensation for legal services rendered to the defendant by him and the plaintiffs in reference to and in connection with the income and excess profits taxes claimed by the United States Commissioner of Internal Revenue to be due from the defendant for the years 1918 and 1919; and that the plaintiffs are the equitable and bona fide owners of said claim for compensation for legal services so rendered the defendant.

"And that in the year 1923 the defendant received a notice from the United States Collector of Interval Revenue stating that certain deductions made by the defendant in its income and excess profits tax returns for the years 1918 and 1919 were not allowable by said Collector and that additional taxes were therefore claimed for said tax years; that thereupon the defendant retained the firm of Hyde, Hennings, Thulin, Westbrook and Watson to take charge of said matters on behalf of said defendant and to resist the claims for additional taxes and take any and all steps that might be necessary to adjust, settle or resist said claim for additional taxes, and authorized said attorneys to cause audits to be made of the business of the defendant for said years, and agreed to pay said firm reasonable fees for services rendered and to be rendered in connection with said matters.

"And that the said law firm accepted said employment and engaged auditors to assemble said financial data relative to the business of the defendant for said years; that said data was prepared under the direction of said firm of attorneys and that the statements were used in connection with the hearings in the United States Internal Revenue Department; that the said co-partnership or firm, through one of its partners, attended hearings in Chicago and Washington; and thereafter attended four appeal hearings held in Chicago and four appeal hearings held in Washington in reference to said claim for additional taxes; that thereafter a finding was made by the Commissioner of Internal Revenue that said additional income and excess profits taxes were due, and a demand was made for payment by the defendant for additional income and excess profits taxes and penalties for the year 1918 in the sum of $113,578.65; that thereafter a finding was made by said Commissioner that additional income and excess profits taxes and penalties were due, and a demand was made on the defendant for the payment of $8,826.15 for the year 1919; that thereafter said co-partnership, through one or more of said partners, prepared and filed a petition for review before the United States Board of Tax Appeals in Washington for each of said tax years; that said attorneys attended and represented the defendant at the trial before the United States Board of Tax Appeals in Washington and thereafter prepared and filed a brief in connection therewith; that as a result of said services a finding was made by said Board of Tax Appeals in February, 1927, sustaining the contentions made by said attorneys and directing that the taxes for the years 1918 and 1919 be recomputed; that thereafter said attorneys appeared before the United States Board of Tax Appeals and submitted a recomputation of said taxes; that as a result, a final order was entered by said United States Board of Tax Appeals finding the taxes due for the year 1918 to be $12,714.34 instead of $113,578.65, and that there were no additional income and excess profits taxes due for the year 1919; and that as a result of said services there was a saving to the defendant in the total sum of $109,904.80; and that the defendant thereupon became and is now liable to pay the plaintiffs the sum of $39,702.50 for their reasonable fees and charges in connection therewith."

The defendant filed a plea of the general issue. No question is raised as to the pleadings.

That the plaintiffs made out a prima facie case cannot be seriously disputed. Frederick A. Thulin was a certified public accountant and also an attorney at law. He was a partner in the plaintiff firm from 1920 until August 5, 1929, on which date he retired from the firm and sold to the partnership all his interest in the same, including the instant claim. The theory of the defendant, as stated in its brief, is "that Thulin was employed in the latter part of 1919 to audit the books of the defendant corporation, and to take care of all of defendant's tax work and associated legal matters for a stipulated retainer of $500 per year and out of pocket expenses; that the consideration for the employment of Thulin in 1919 was that he was both an accountant and a lawyer and could take care of both the accounting and legal work in connection with the auditing and tax matters of the defendant corporation; that Thulin undertook to, and did, from 1919 to 1928, attend to the auditing, tax and associated legal matters for defendant, or caused the same to be attended to by someone acting for him, including the accounting firm of Thulin and Company, of which Thulin was president, and the plaintiff law firm, of which Thulin and Watson were members under the $500 a year contract; that there was no new employment of Thulin or Watson or of said law firm and no agreement in 1923, or at any time, with reference to additional compensation, either for Thulin or Watson, or the plaintiffs' law firm, for handling the 1918 and 1919 tax matters," and that the yearly payment by the defendant of $500 and out of pocket expenses paid for the services for which the plaintiffs are suing. The plaintiffs maintained that Thulin was never employed by the defendant to audit the books of the defendant cor-

The defendant files a plea of general issue. By consent it is relied on by the plaintiff.

That the plaintiff made out a prima facie case entitling it to recover was admitted by counsel for defendant in open court.

Defendant's theory of the case is that the plaintiff's claim was not presented within sixty days after the accident and that by reason thereof all its rights of action against defendant were barred. Defendant's counsel argued

poration and to take care of all of defendant's tax work and associated legal matters for a stipulated retainer of $500 a year and out of pocket expenses, but that early in 1920 Thulin & Company, an auditing firm, undertook to render auditing and accounting services to the defendant, but did not stipulate any price in advance, and that the plaintiffs' claim for services was not connected in any way with the Thulin contract and was not governed by it.

Many points are raised by the plaintiffs in support of their contention that the instant judgment should be reversed, but in the view that we have taken of this appeal it is necessary for us to consider only the complaints made by them as to certain instructions given to the jury at the instance of the defendant. The plaintiffs argue, and with considerable force, that the verdict is against the manifest weight of the evidence, but we do not deem it necessary to determine this contention. It is sufficient to say that the case is, at least, close upon the material facts, and under such a state of the evidence it was necessary that the jury be accurately instructed as to the law applicable to the case.

At the instance of the defendant the court gave to the jury the following instruction:

"The Court instructs the jury that, if you find from the evidence that the plaintiff law firm, or Frederick A. Thulin, rendered a bill for services, in the tax litigation in question, leaving the amount blank to be filled in by defendant for any amount it saw fit, the rendering of such a bill in blank is in the nature of an admission on the part of plaintiffs, and if you further find from the evidence that the rendering of such a bill, if any, was not procured through any element of mistake or fraud, it is an admission of the strongest character on the part of the plaintiff law firm and the said Frederick A. Thulin that there was no agreement or understanding that a fee in any amount was to be paid plaintiff law firm for such services, and may be considered by the jury together with all of the other evidence in the record in determining whether or not there was any such agreement or understanding."

The defendant relies upon the following evidence in support of this

instruction: On December 9, 1927, the following letter was mailed to W. B. Templeton, the president of the defendant company:

"Hyde, Hennings, Thulin, Westbrook and Watson
10 South LaSalle Street
Chicago

December 9, 1927.

Mr. W. B. Templeton,
1020 S. Central Ave.,
Chicago, Illinois.

Mr dear Mr. Templeton:

I am enclosing herewith legal bill covering your tax matters for 1917, 1918, 1919 and 1920, the finish of which has just been carried through - you will notice I have left the amount of the bill blank.

For your information I am giving you a resume of the result of this activity.

I would like to talk the matter of the amount of the bill over with you some time, and to have you talk it over with some other members of the board of directors to get a line on what everyone thinks is fair in the premises.

Settlement need not be in cash - I would just as soon take preferred stock of your company.

Yours very truly,
(Signed) F. A. Thulin.

FT-MH"

The letter contained the following inclosures:

"Templeton, Kenly & Co. Ltd.
Chicago, Ill.

Federal Income Taxes

	Revenue Department Additional Assessments			Final Settlement	
	Tax	Penalty	Total		
Year 1917	$15264.40	.....	15,264.40	$7494.48	Paid
" 1918	75719.10	37859.55	113,578.65	12714.33	
" 1919	5884.10	2942.05	8,826.15	1645.76	
	Total.....		$137,669.20	$18563.05	
Total additional assessment and penalty ...				$137,669.20	
Total final settlement				18,563.05	
Total tax cut				$119,106.15	

December 9, 1927."

"Hyde, Hennings, Thulin, Westbrook and Watson
10 South LaSalle Street
Chicago

December 9, 1927.

Instructions: On December 5, 1917, the following letter was mailed
to T. B. Templeton, the principal debtor mentioned:

"Hyde, Barclays, Todin, Terrbrook and Tatman
  Le Roux Imperial Trust
    Toronto

December 5, 1917.

Mr. T. B. Templeton,
  1000 B. Centre Ave.,
  Chicago, Illinois.

Dear Mr. Templeton:

I am enclosing herewith Legal Bill amounting from Dec entered thereon - you will notice I have left the amount for the bill blank.

For your information I am giving you a resume of the result of this matter.

I would like to call your attention to the amount of the bill for 1917, 1918 and 1919. The items of which are just been over with you many times, and to have you talk it over with them before completing the final settlement.

Yesterday this is the 5th December.

Yesterday was the 4th - I would just as soon take advantage of the fact to close it over with them if you can, and to have you talk it over with them before completing the final settlement.

Yours very truly,

(Name) P. P. Smith.

DC-MLC

The letter mentioning the following inclosures:

"Templeton, Bundy & Co. Ltd.
  Chicago, Ill.

Personal Income Taxes

		Penalty	Total	Interest	Total
Year 1917	$1,164.40	.....	$1,164.40	$100.49	$1,264.89
" 1918	7,219.10	$360.95	7,580.05	394.32	7,974.37
" 1919	3,806.10	190.30	3,996.40	124.33	4,120.73
Total			$12,741.09		$13,360.03
Total additional assessments now pending ...					$137,000.00
Total final settlement					$150,360.03
Total tax due					$13,360.03

December 5, 1917."

"Hyde, Barclays, Todin, Terrbrook and Tatman
  Le Roux Imperial Trust
    Toronto

December 5, 1917.

Templeton, Kenley & Co., Ltd.,
1020 S. Central Ave.,
Chicago, Illinois.

To: Hyde, Hennings, Thulin, Westbrook and Watson

To legal and accounting services rendered re Federal tax matters for the years 1917, 1918, 1919 and 1920, as follows:

Re - 1917:
3 appeal hearings in Chicago
2 appeal hearings in Washington
Preparation of appeal data pertaining thereto:

Re - 1918, 1919 and 1920:
4 appeal hearings in Chicago
4 appeal hearings in Washington
1 hearing before Board of Tax Appeals in Washington
Preparation of data in conjunction therewith."

There is nothing in the letter or the bill for legal and accounting services inclosed therein to justify the giving of the instant instruction. While it is true that the amount of the fees is left blank in the bill, nevertheless, the mere act of billing supposes an indebtedness due from the defendant to the plaintiffs and the letter expressly suggests that the amount of the bill be fixed by conference between the parties "on what everyone thinks is fair," and the concluding sentence completely refutes the theory of the defendant that leaving the amount blank "was an admission of the strongest character on the part of the plaintiff law firm and the said Frederick A. Thulin that there was no agreement or understanding that a fee in any amount was to be paid plaintiff law firm for such services." The resume of the result of the services rendered, inclosed in the letter, also tends to show how idle is the contention of the defendant as to the effect of the bill. The assumption in the instruction that leaving the amount blank authorized the defendant to fill in any amount it saw fit, is without the slightest justification, in view of the plain language of the letter. Several letters written by Thulin to the defendant after the communication of December 9 also show that the

Templeton, Dunlop & Co., Ltd.,
1020 1. Central ave.,
Chicago, Illinois.

To: Hyde, Dunlop, Smith, Publishers and Printers

To legal and accounting entities requiring to Publish
ten notices for the Years 1911, 1912, 1913 and 1914,
as follows:

Ka - 1911:
3 usual Meetings in Chicago
2 annual meetings in Publication
Preparation of annual data pertaining thereto:

Ma - 1912, 1913 and 1914:
4 annual meetings in Chicago
6 annual meetings in Publication
7 Meeting Notice Board of Law Update in Publication
Preparation of data in modification thereof."

There is nothing in the letter or the bill for Legal and accounting services incidental thereto justify the raising of the instant prosecution. While it is true that the amount of the item in Ist Bank in the bill, aforementioned, the mere act of billing supposes an independence due from the defendant to the plaintiff, and the Invoice expressly mentions what the amount of the bill be fixed by conference between the parties "as what services claims it Did," was the undersigned sentence completely refutes the theory of the aforesaid that leaving the amount blank "was an admission of the disagreed amounted was to be paid plaintiff Inv also and the said Brunswick ". Smith that there was no agreement at endorsement that a fee is any amount on the part of the plaintiff Inv also and the said Brunswick ". Smith

bill mailed the defendant was intended as a bill for legal and accounting services rendered the defendant by the plaintiffs. Even if the bill could be construed to be an admission such as is assumed in the instruction, nevertheless, the statement in the instruction that "it is an admission of the strongest character" clearly invades the province of the jury. It is always the province of the jury to determine the weight, if any, that shall be given to admissions. (Westbrook v. Howell, 34 Ill. App. 571; Young v. Foute, 43 Ill. 33, 39; Mauro v. Platt, 62 Ill. 450; Ayers v. Metcalf, 39 Ill. 307; St. Louis Car Co. v. Glover Equipment Co., 298 Fed. Rep. 404, 408.) The court has no right to tell the jury that an admission is a weak kind of evidence. (Mauro v. Platt, supra.) Nor that admissions "are good evidence." (Young v. Foute, supra.) Nor that the admissions of a party are strong evidence against him. (Westbrook v. Howell, supra.) Many other authorities to the same effect might be cited. The defendant cites Daniels v. Wilber, 60 Ill. 526, and Patterson v. Houston, 92 Ill. App. 624, in support of the use of the language in question. These cases are not applicable, as no question as to instructions was involved in either. Our Supreme court, on a number of occasions, has commented upon the practice of converting sentences in the opinion of the court into instructions, and has held that it is a bad practice and one that often leads into serious error. It is the settled law that an instruction which singles out particular facts and gives them undue prominence has a tendency to mislead and confuse the jury and is improper. (See Puterbaugh's Com. Law Pl. & Pr., 10th ed., p. 1385, where many cases upon this subject are cited.) The bill was only one of many circumstances that the jury had to consider in determining the issues in this case, and we think the instruction violated the rule we have just mentioned. The instruction ignores the letter in which the bill was inclosed and which explained

ignores the letter in which the bill was received and which explained the instructions violated the rule we have just mentioned. The instruction to consider in determining the issues in this case, can we think the bill was only one of many circumstances that the jury had to consider in determining the issues in this case, but we think the bill was entitled to consideration as an instruction which singles out particular facts and gives them undue prominence has a tendency to mislead and confuse the jury and is improper. (See Instruction 1-2, Ind. Pr. & Pr., John ed., p. 1288, where many cases upon this point are cited.)

It is the settled law that an instruction which singles out particular facts and gives them undue prominence has a tendency to mislead and confuse the jury and is improper. (See Instruction 1-2, Ind. Pr. & Pr., John ed., p. 1288, where many cases upon this point are cited.) The bill was only one of many circumstances that the jury had to consider in determining the issues in this case, but we think the bill was entitled to consideration as an instruction which singles out particular facts and gives them undue prominence has a tendency to mislead and confuse the jury and is improper. (See Instruction 1-2, Ind. Pr. & Pr., John ed., p. 1288, where many cases upon this point are cited.)

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clearly the reason for leaving the amount of the bill blank. We are satisfied that the giving of the instant instruction was highly prejudicial to the rights of the plaintiffs and that the latter are warranted in contending that it, alone, was sufficient to account for the verdict.

The plaintiffs contend that the court erred in giving to the jury, at the instance of the defendant, instruction number six, which reads as follows:

"The Court instructs the Jury that if you believe from the evidence that there was an express contract between defendant and Frederick A. Thulin personally covering accounting and tax work for defendant and legal services growing out of defendant's tax matters, for which a yearly sum of $500.00, plus out of pocket expense, was to be paid to Thulin or Thulin & Company, and if you further find that the said accounting firm and plaintiffs law firm rendered such services and billed defendant under said contract from year to year and were paid by defendant in accordance with said contract as such bills were rendered, and if you further find from the evidence that the services for which plaintiffs seek to recover in this suit were the same kind of services contemplated by such contract and that nothing was said by the said Thulin or plaintiffs law firm about additional compensation for such services, then the payments made by defendant to the said Thulin and plaintiffs law firm and received by them constituted settlement and payment in full of and for all demands by the said Thulin and plaintiffs law firm, or either of them, for such services during the term of their employment, and if you so believe and find from all of the evidence in the case, then plaintiffs cannot recover and your verdict must be for the defendant."

This contention is a meritorious one. The contract between Thulin and the defendant was made in 1919. The theory of the plaintiffs was that they were employed by the defendant in 1923 to oppose the government's contentions as to the 1918 and 1919 taxes, and there is undoubtedly some evidence tending to support this theory. The instruction, one which directs a verdict, entirely ignores the plaintiffs' theory of recovery. This error in the instruction cannot be cured by other instructions. The instruction is also erroneous wherein it states, in effect, that to warrant a recovery for the plaintiffs they must prove that the latter made express statements to the defendant concerning additional compensation for such services. The statement in the instruction is based upon the erroneous theory that an express

clearly the reason for leaving the account at the *Fifi Blanc*. To
are entitled that the giving of the instant instruction was highly
prejudicial to the rights of the plaintiffs and that the latter are
warranted in contending that [illegible] sufficient to support
for the verdict.

The plaintiffs contend that the court erred in giving to
the jury, at the instance of the defendant, instruction number six,
which reads as follows:

"The court instructs the jury that if you believe from
the evidence that there was an express contract between defendant
and Frederick A. Smith personally covering the use and use work
for defendant and legal services prior to [illegible] to
matters, for which a yearly fee of [illegible], plus out of pocket
expense, was to be paid to Smith & Smith & Company, and if you
further find that the said accounting firm and Alexander Law Firm
rendered such services and billed defendant monthly and received from
year to year and were paid by defendant in accordance with such con-
tract as such bills were rendered, and if you further find from the
evidence that the services for which plaintiffs sued to recover in
this suit were the same kind of services contemplated by said contract
and that nothing was said by the said Smith or Alexander Law Firm
about additional compensation for such services, then the plaintiffs
are by defendant to the said Smith and Alexander Law Firm and
barred by them committed estoppel and payment in full of and
for all demands by the said Smith and plaintiffs Law Firm, or either
of them, for such services over and above of said contract, and
it you so believe and find from all of the evidence in the case, then
plaintiffs cannot recover and your verdict must be for the defendant."

This construction is a meritorious one. The contract between Smith and the defendant was made in 1918. The theory of the plaintiffs was that they were employed by the defendant in 1920 to assume the [illegible]'s connections as to the 1918 and 1919 taxes, and there is accordingly some evidence tending to support this theory. The instruction, one which directed a verdict, entirely ignores the plaintiffs' theory of recovery. This error in the instruction cannot be cured by other instructions. The instruction is also erroneous because it tends to warrant a recovery for the plaintiffs they went in effect, that to warrant a recovery for the plaintiffs they must
[illegible] that the latter made explicit assessments to the defendant con-
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the instruction is based upon the erroneous theory that an express

reference to compensation by the plaintiffs was essential to raise an implied promise to compensate plaintiffs for services rendered to it and by it accepted, whereas the plaintiffs claimed an implied promise by the defendant to compensate them for their services.

The plaintiffs contend that the court erred in giving to the jury defendant's instruction number eight, which reads as follows:

"The Jury are further instructed that if you find from the evidence and the circumstances in this case that the services for which plaintiffs seek to recover in this suit were such as were contemplated by the contract, if any, between Thulin and defendant, and if you further find that the decision to charge for such service was an after-thought on the part of plaintiffs and Thulin, then plaintiffs cannot recover and your verdict should be for defendant."

The contention is clearly a meritorious one. The instruction, one which directs a verdict, ignores entirely the theory of fact upon which the plaintiffs' claim is predicated. By it the jury were told, in effect, that if they found that the services for which the plaintiffs sued were such as were contemplated by the contract between Thulin and the defendant, then the plaintiffs could not recover even though they were employed by the defendant to perform the special services in relation to the 1918 and 1919 taxes. The instruction is also exceedingly harmful to the plaintiffs because of the intimation contained therein that the plaintiffs' claim was an afterthought.

There is also merit in the contention of the plaintiffs that the court erred in giving to the jury, at the instance of the defendant, instructions numbers seven and ten.

The plaintiffs complain that in four different instructions, given for the defendant, all of which directed a verdict, the alleged Thulin contract is referred to and that thereby undue prominence and emphasis is given to that contract, and that the plaintiffs were seriously prejudiced thereby. This contention is not without force. (See Puterbaugh's Com. Law Pl. & Pr., 10th ed., p. 1385.)

As this case may be tried again, we refrain from commenting

upon the facts and circumstances in evidence, but we feel impelled to say, however, that we have found it difficult to believe that such important work as was involved in the proceedings from which the plaintiffs' claim arose could have been intended by the parties as covered by the alleged contract between Thulin and the defendant.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

35495

JOHN WILLIAMSON,
Appellant,

vs.

MARJORIE EATON,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

115 A

266 I.A. 614

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Williamson sued Marjorie Eaton in case. There was a trial before the court, with a jury, and a verdict returned finding the defendant not guilty. Judgment was entered upon the verdict and the plaintiff has appealed.

The plaintiff sued to recover damages for personal injuries sustained by him in an accident which occurred on May 29, 1930. The accident happened on U. S. Route No. 12 at a point approximately one mile east of the town of Watervliet, Berrien county, Michigan, and a few hundred feet west of the railroad tracks of the Pere Marquette Railway, which crosses U. S. Route No. 12 near the place of the accident. The plaintiff, twenty years old, was an occupant in the car of Charles W. Ergang, Jr., who was driving the car in a westerly direction on said route on his way to Chicago. The Ergang car, a Chrysler roadster, had crossed the railroad tracks and had proceeded about 400 or 500 feet beyond the tracks when there was a collision between the Ergang car and the car of the defendant, which was proceeding in the opposite direction. As a result of the collision the plaintiff was seriously injured.

The plaintiff contends that "the verdict is against the clear weight and preponderance of the evidence." After a very careful examination of all the facts and circumstances bearing upon the accident we have reached the conclusion that this contention is a meritorious one. In view of the evidence the verdict of the jury is hard to understand. As the case may be tried again, we refrain

35495

JOHN WILLIAMSON,
Appellant,

vs.

MARJORIE EATON,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

266 I.A. 614[2]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Williamson sued Marjorie Eaton in case. There was a trial before the court, with a jury, and a verdict returned finding the defendant not guilty. Judgment was entered upon the verdict and the plaintiff has appealed.

The plaintiff sued to recover damages for personal injuries sustained by him in an accident which occurred on May 30, 1930. The accident happened on U. S. Route No. 12 at a point approximately one mile east of the town of Watervliet, Berrien county, Michigan, and a few hundred feet west of the railroad tracks of the Pere Marquette Railway, which crosses U. S. Route No. 12 near the place of the accident. The plaintiff, twenty years old, was an occupant in the car of Charles T. Krueng, Jr., who was driving the car in a westerly direction on said route on his way to Chicago. The Krueng car, a Chrysler roadster, had crossed the railroad tracks and had proceeded about 400 or 500 feet beyond the tracks when there was a collision between the Krueng car and the car of the defendant, which was proceeding in the opposite direction. As a result of the collision the plaintiff was seriously injured.

The plaintiff contends that "the verdict is against the clear weight and preponderance of the evidence." After a very careful examination of all the facts and circumstances bearing upon the accident we have reached the conclusion that this contention is a meritorious one. In view of the evidence the verdict of the jury is hard to understand. As the case may be tried again, we refrain

from analyzing and commenting upon the facts and circumstances in evidence.

The plaintiff contends that the court erred in giving to the jury defendant's instruction number two, which reads as follows:

> "You are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence before he can recover. If the plaintiff in this case has not so established his case, or if the evidence is evenly balanced so that you are unable to say on which side is the preponderance, then, in either of these cases, the verdict should be not guilty." (Italics ours.)

This instruction is clearly erroneous, as it places upon the plaintiff a greater burden and degree of proof than the law requires. In Hurzon v. Schmitz, 262 Ill. App. 337, in passing upon a similar instruction, the court said (p.339): "The instruction is erroneous for another reason. It informed the jury that the plaintiff in order to recover must establish certain facts. In a civil case a plaintiff is entitled to recover if the evidence creates probabilities in his favor, - that is, that the weight of the evidence inclines to his side. Crabtree v. Reed, 50 Ill. 206. A plaintiff is not required to establish any elements essential to a recovery. McMasters v. Grand Trunk Ry. Co., 155 Ill. App. 648. The word 'establish' ordinarily means to settle finally, to fix unalterably. It is not necessary in a civil action that any fact should be established - that is, settled certainly, or fixed permanently - which may have been uncertain, doubtful or disputed before. Eberhardt v. Sanger, 51 Wis. 72, 79, 8 N. W. 111; Endowment Rank v. Steele, 107 Tenn. 1, 63 S. W. 1126; International & G. N. R. Co. v. Duncan, 55 Tex. Civ. App. 440, 121 S. W. 362; Van Geem v. Cisco Oil Mill (Tex. Civ. App.), 152 S. W. 1108. The instruction placed a higher burden upon appellant than the law required. It was very much like telling the jury that appellant was required to prove the facts stated to the satisfaction of the jury or beyond a reasonable doubt. Instructions requiring a plaintiff to prove his case by a

> "You are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence. If the evidence in this case is not sufficient to do so or equally balanced as to whether or not liability exists, then your verdict should be for the defendant."
>
> (Italics ours.)

This instruction is clearly erroneous, as it places upon the plaintiff a greater burden and degree of proof than any law requires. In Burton v. Zemelka, 340 Ill. App. 187, in passing upon a similar instruction, the court said (p. 208): "The instruction is misleading for another reason. It informed the jury that the plaintiff in order to recover must establish certain facts. It - still went a step further in telling us that the evidence supporting those facts must preponderate to the extent that it - that it - must be of such a character as to satisfy the mind of the jurors to the exclusion of all reasonable doubt." Cf. Chicago v. Reed, 61 Ill. App. 484. A preponderance of evidence is not required to establish any element essential to a recovery. It is not necessary to prove a claim beyond any fair question, as is sometimes said. 'Reasonable' ordinarily means to satisfy fully, to the exclusion of all reasonable doubt - that is, entirely persuasive, or fixed persuasively - when used here to modify 'certainty' or 'satisfy' or 'clear' or 'convincing'. Kennedy v. Great Lakes C. Co., 124 Ill. App. 619. The word 'satisfy' ordinarily means to satisfy fully, to the exclusion of all reasonable doubt - that is, entirely persuasive, or fixed persuasively - when used here to modify certainty, or fixed persuasively when used to modify 'satisfy' or 'clear' or 'convincing'. Kennedy v. Great Lakes C. Co., 124 Ill. App. 619. The word 'satisfy' ordinarily means to satisfy fully, to the exclusion of all reasonable doubt, or to the extent that the mind is at rest. Chicago v. Reed, 61 Ill. App. 484. A preponderance of evidence is not required to establish any element essential to a recovery. It is not necessary to prove a claim beyond any fair question, as is sometimes said. 'Reasonable' ordinarily means to satisfy fully, to the exclusion of all reasonable doubt - that is, entirely persuasive, or fixed persuasively - when used here to modify certainty, or fixed persuasively when used to modify 'satisfy' or 'clear' or 'convincing'. Kennedy v. Great Lakes C. Co., 124 Ill. App. 619. The word

> "You are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence. If the evidence in this case is not sufficient to do so or equally balanced as to whether or not liability exists, then your verdict should be for the defendant."
>
> (Italics ours.)

This instruction is clearly erroneous, as it places upon the plaintiff a greater burden and degree of proof than any law requires. In Burton v. Zemelka, 340 Ill. App. 187, in passing upon a similar instruction, the court said (p. 208): "The instruction is misleading for another reason. It informed the jury that the plaintiff in order to recover must establish certain facts. It - still went a step further in telling us that the evidence supporting those facts must preponderate to the extent that it - that it - must be of such a character as to satisfy the mind of the jurors to the exclusion of all reasonable doubt." Cf. Chicago v. Reed, 61 Ill. App. 484. A preponderance of evidence is not required to establish any element essential to a recovery. It is not necessary to prove a claim beyond any fair question, as is sometimes said. 'Reasonable' ordinarily means to satisfy fully, to the exclusion of all reasonable doubt - that is, entirely persuasive, or fixed persuasively - when used here to modify certainty, or fixed persuasively when used to modify 'satisfy' or 'clear' or 'convincing'. Kennedy v. Great Lakes C. Co., 124 Ill. App. 619. The word 'satisfy' ordinarily means to satisfy fully, to the exclusion of all reasonable doubt, or to the extent that the mind is at rest. Chicago v. Reed, 61 Ill. App. 484. A preponderance of evidence is not required to establish any element essential to a recovery. It is not necessary to prove a claim beyond any fair question, as is sometimes said. 'Reasonable' ordinarily means to satisfy fully, to the exclusion of all reasonable doubt - that is, entirely persuasive, or fixed persuasively - when used here to modify certainty, or fixed persuasively when used to modify 'satisfy' or 'clear' or 'convincing'. Kennedy v. Great Lakes C. Co., 124 Ill. App. 619. The word

> "You are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence. If the evidence in this case is not sufficient to do so or equally balanced as to whether or not liability exists, then your verdict should be for the defendant."
>
> (Italics ours.)

This instruction is clearly erroneous, as it places upon the plaintiff a greater burden and degree of proof than any law requires. In Burton v. Zemelka, 340 Ill. App. 187, in passing upon a similar instruction, the court said (p. 208): "The instruction is misleading for another reason. It informed the jury that the plaintiff in order to recover must establish certain facts. It - still went a step further in telling us that the evidence supporting those facts must preponderate to the extent that it - that it - must be of such a character as to satisfy the mind of the jurors to the exclusion of all reasonable doubt." Cf. Chicago v. Reed, 61 Ill. App. 484. A preponderance of evidence is not required to establish any element essential to a recovery. It is not necessary to prove a claim beyond any fair question, as is sometimes said. 'Reasonable' ordinarily means to satisfy fully, to the exclusion of all reasonable doubt - that is, entirely persuasive, or fixed persuasively - when used here to modify certainty, or fixed persuasively when used to modify 'satisfy' or 'clear' or 'convincing'. Kennedy v. Great Lakes C. Co., 124 Ill. App. 619. The word

clear preponderance of the evidence, to produce evidence to satisfy the jury, or to prove certain facts to the satisfaction of the jury, have been frequently condemned. Crabtree v. Reed, 50 Ill. 206; Rolfe v. Rich, 149 Ill. 436; Sonnemann v. Mertz, 221 Ill. 362; Teter v. Spooner, 305 Ill. 198." "In civil cases the burden of proof which rests upon the party holding the affirmative of the issue is to prove the issue by a preponderance of the evidence, and it is error to give an instruction to the jury which imposes a greater burden, such as to convince the jury, or to satisfy the jury, or prove to the satisfaction of the jury. All that is required of the party having the burden of proof is to prove the issue by a preponderance of the evidence. * * * The use of the adjectives 'slight' and 'clear,' with reference to the preponderance of the evidence required to sustain an issue, is only confusing to the jury. They ought not to be used in instructions in any case. Nobody knows what is a slight preponderance or what is a clear preponderance of the evidence, although everyone knows what is meant by a preponderance of the evidence." (Teter v. Spooner, 305 Ill. 198, 210-11.) "Whatever may have been the earlier rule in regard to the quantum of evidence necessary to warrant a verdict in a case of this character, it is now well settled that a preponderance of the evidence is sufficient. Supplying qualifying terms to the word 'preponderance' in instructions is now generally condemned. The use of the adjectives 'full,' 'complete,' 'clear,' and the like in connection with that word is now generally disapproved. (Teter v. Spooner, 305 Ill. 198; Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207.)" (Cooper v. Nutt, 254 Ill. App. 445, 460.)

The plaintiff contends that "the court erred in allowing on cross-examination irrelevant and immaterial conversation to be introduced in evidence by the defendant, which were inflammatory and highly

prejudicial to the plaintiff." The plaintiff called as a witness one Shrosbee, a constable of Berrien county, Michigan. He testified, on direct, that he answered a fire call and went to the scene of the accident with the fire apparatus and arrived there shortly after the accident and that he talked with the defendant. The following then occurred: "Q. What was said? A. They claimed the yellow roadster coming from the east hit them." This is the only testimony of the witness, on direct examination, in regard to any conversation. On cross-examination the following occurred: "Q. Officer, I do not want to transgress the ruling of the court, but I want to ask my question - Didn't you then and there tell these people in the automobile that automobiles that come across that crossing on account of its rough condition and the speed of the auto when the auto swung over and struck your automobile which was parked to the right of the highway just a short distance from the Pere Marquette tracks, or words to that effect? Mr. Mahony (attorney for plaintiff): I object. The Court: Overruled. * * * Mr. Peterson (attorney for defendant): Didn't you tell them that in substance? A. I did, an accident something like that, yes. Q. You explained to them that probably when you were talking about the crossing, that is the way this thing happened, didn't you? The Court: If he said that at that time. Mr. Mahony: I objected. Is my objection ruled on the last question? The Court: Yes, overruled. Mr. Peterson: Didn't you also tell them, officer, that because of the condition there at the crossing, you knew of automobiles that had missed the highway after hitting those planks and run to the right and then over across the roadway, or words to that effect? Mr. Mahony: I object. The Court: Overruled. Mr. Mahony: Exception. Mr. Peterson: Don't you remember telling them that? A. I don't remember. I couldn't say for sure. Q. You just stop and think a minute. A. Of course,

accidents, I do see a lot difference in this man. This man that hit me was drunk. Q. I am asking you about a conversation about the crossing. A. The man that hit me was clean off the highway." The contention is clearly a meritorious one. The defendant attempts to meet the instant contention by claiming that the question put to the witness on direct, "Q. What was said?" gave the defendant, on cross-examination, the right to call for all that was said by the various persons taking part in the conversations and regardless of the subject matter of what was said. The weakness of this position is evident. Assuming that the single question put to the witness on direct opened the door to the entire conversation in regard to the cause of the accident in question, nevertheless, the question did not open the door to a statement by the witness as to some other accident that occurred at a previous time and under entirely different circumstances. The fact that the witness may have had an accident at the railroad crossing, which was 500 feet from the scene of the accident in question, could have no bearing whatever on the merits of the instant case. "We recognize the rule of evidence that 'where part of a conversation is put in evidence by one party, the other is entitled to put in the whole so far as it is relevant.' 2 Wharton on Evidence, sec. 1108. This rule is usually invoked for the benefit of the party against whom the conversation is introduced, and is generally applicable to admissions for the reason that such other parts of the conversation may tend to explain, modify or even destroy the admission. Chicago City Ry. Co. v. Bundy, 210 Ill. 39, 44. But we know of no rule which entitles a party in the first instance to call for an entire conversation when only a part of it is relevant. Even when the adverse party seeks to call out the whole conversation, it must be confined to the subject matter about which the conversation was called out. Chicago & A. R. Co. v. Thompson, 19 Ill. 578." (Alsup

v. Ray, 175 Ill. App. 621, 622. Italics ours.) "It is, however, a fundamental rule of cross-examination that it is to be confined to what was brought out on the direct examination, and where a party examines a witness as to a conversation, the opposing party can only cross-examine him upon the conversation as to the same subject matter. (Chicago and Aurora Railroad Co. v. Thompson, 19 Ill. 578.) The court is not warranted in admitting, on cross-examination, statements about other persons or matters because they were included in the conversation." (The People v. Robertson, 284 Ill. 620, 624; see also Chicago & Aurora R. R. Co. v. Thompson, 19 Ill. 578, 583.) The plaintiff justly contends that the railroad crossing had no real bearing on the accident in question and that the injection of the statements of the witness led the jury to believe "that because some other person at some different time under different circumstances had had an accident at a railroad crossing that possibly that crossing had something to do with the case that they were trying," and the plaintiff calls our attention to the fact that counsel for the defendant, in his closing argument, constantly claimed that the railroad crossing played an important part in the accident.

We do not deem it necessary to refer to other contentions raised by the plaintiff.

The plaintiff has not received a fair trial and the judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

Corbin, 3d ed. 1960, sec. 564, p. 6; sec. 567, p. 15.

Restatement (2d) Contracts, sec. 90.

The plaintiff has not received a fair trial and the judgment of the Supreme Court of Cook County is reversed and the cause is remanded.

Reversed and remanded.

MR. JUSTICE SCHAEFER, dissenting:

I do not think it necessary to refer to other instructions given at the instance of the defendant. Considered alone, the instruction to which objection is made is not misleading. It is in the language of the Illinois Pattern Instructions, and it is to be expected that a jury will understand it as it was intended. The plaintiff was not entitled to a directed verdict, and there is no reason to believe that the jury failed to perform its duty to decide the case on the evidence. The judgment should be affirmed.

35528

35528

ALVIN WOZBUT,
Appellant,

v.

JOE JURIS,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

266 I.A. 614

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Alvin Wozbut brought an action against Joe Juris in the Municipal court of Chicago. On April 30, 1931, an ex parte jury trial, had before Judge Lupe, resulted in a verdict in favor of the plaintiff for $2,000 and judgment immediately followed. On June 24, 1931, the defendant filed a "petition in the nature of a bill for coram nobis," praying that the judgment order be vacated and set aside. From an order thereafter entered vacating and setting aside the judgment plaintiff has appealed.

The plaintiff, in his statement of claim, alleges, in substance, that the defendant, while in the employ of the plaintiff, collected moneys in the sum of $1,663; that thereafter, on March 14, 1925, there was an accounting between the plaintiff and the defendant "which ripened into an account stated for that amount on March 14, 1925," no part of which the defendant has paid the plaintiff. The defendant, in his affidavit of merits, denies that there was an account stated between the parties and alleges that he turned over to the plaintiff all the moneys collected by him, and denies that he is indebted to the plaintiff in the amount of $1,663 or any sum whatsoever. The verified petition of the defendant sets up, inter alia, "that he has employed an attorney to watch said cause; that this defendant has been ready at all times

92823

Appellant,

A.

The JUDGE,

Appellee.

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

to defend said action but that plaintiff has continually postponed same; * * * that he was informed by his attorney that said cause was set for trial April 30, 1931, in Room 1120 City Hall, and that he appeared there with his attorney; that said case was called for trial and no one appearing for plaintiff; that this defendant and his attorney stepped up to the Judge and asked that said cause be continued and that same was continued until June 19, 1931, by his Honor Judge Lupe; that he left the court room; that he did not know that an ex parte judgment in the sum of $2,000 was had against this defendant until an execution was served on him on June 19, 1931; that the clerk evidently forgot to mark the continuance on his record, and that said cause was tried ex parte by mistake, his Honor, Judge Lupe not knowing he had already continued same; that this defendant is not indebted to plaintiff in any sum whatever."

Upon the hearing of the petition "Mr. Keeley" testified, in substance, that on April 30, 1931, he was the minute clerk before Judge Lupe, that Wozbut v. Juris was one of the cases on the trial call of that judge for that day; that about 9:30 a. m. that day the judge had a first call, or "preliminary call," of the cases; that when that case was called the attorney for the defendant, Mr. Frohlich, stepped up to the bar of the court, no one appearing for the plaintiff, and that the court then announced a continuance of the cause and that he (the minute clerk) made the following notation on the file envelope, "6-19-31;" that the notation he thus made indicated that the case had been continued until June 19; that he cannot make such a notation on the file "unless it is the Judge's order because I can't give orders." When interrogated as to whether or not he had thereafter called the court's attention to the fact that the case was set for the 19th, he answered: "No, I did not. If I had done that, this

to defend said action but that plaintiff has sentimentally postponed same] * * * that he was informed by his attorney that said cause was not for trial April 5th, 1923". In Book 1120 Only Unit, and that he appeared there with his attorney; that said case was called for trial and no one appearing for plaintiff; that this defendant and his attorney stepped up to the judge and asked that said cause be continued and that same was continued until June 15, 1923, by His Honor Judge Lupe; that on July the court found that he did not know that an ex parte judgment in the sum of $5,000 was ing against this defendant until an execution was served on him on June 12, 1923; that the clerk evidently forgot to mark the continuance on his record, and that said record was tried ex parte by plaintiff, his Honor, Judge Lupe not knowing he had already continued same; that this defendant is not indebted to plaintiff in any sum whatever."

Upon the hearing of the petition "B. Hardy" testified, in substance, that on April 30, 1923, he was the attorney before Judge Lupe, that Corbet v. Gloria was set at the court on the trial call of that judge for that day; that about 9:30 a. m. that day the judge ran a first call, or "preliminary call," of the docket when this case was called the attorney for the defendant, ex. rel. Hamilton, stepped up to the bar of the court, no one appearing for the plaintiff, and that the court then announced a continuance of the cause and that he (the minute clerk) made the following notation on the file envelope, "6-10-23;" that the motion be then made indicated that the case had been continued until June 10; that he cannot say that a notation on the file "motion to be docket pending I can't give order." Then interrogated as to whether or not he has distinct the 10th, he answered: "No. I did not. It I had done that, said called the court's attention to the fact that the case was not for trial on the docket.

case would not have been tried." Victor Frohlich, a witness for the petitioner, testified that he was an attorney at law and represented the defendant in the cause; that on April 30 he appeared before Judge Lupe "for trial, with my client and had a reporter here. On the first call of these cases I answered ready and I asked your Honor -- I said, 'Then I can go over to the Superior Court and try a case and your Honor said he could not hear the case today -- and I asked your Honor if you would not put it over to the next Fall. Your Honor said 'You can put it over to June 19, and then it would go over to the next calendar.' And I left the courtroom. I knew nothing of a judgment until my client received an execution and then I immediately served counsel with notice to have it vacated." A witness for the petitioner testified that the ex parte trial took place about 11 or 11:30 a. m. the same day. The plaintiff, respondent, introduced no evidence in rebuttal. The following is the order of the court vacating the judgment:

"This cause coming on to be heard on motion of defendant on petition in nature of a writ of coram nobis; and the court having read said petition under oath, and having heard evidence of all parties and argument of counsel for both plaintiff and defendant; and the court having jurisdiction of the parties hereto and the subject matter hereof.

"And it further appearing to the Court from the evidence that above entitled cause was called for trial on April 30, 1931 in Room 1120 City Hall before his Honor Judge Lupe; and it appearing that the attorney for defendant answered said call, no one appearing for plaintiff; and it appearing that the court continued said cause until June 19, 1931, and the clerk made such notation on the file envelope; and it further appearing that the said cause was again called on said same date for trial, by mistake at which time an ex parte judgment was had; and it appearing that the court had no notice at the time of entry of said judgment, that said case had already been continued until June 19, 1931.

"It is therefore ordered and decreed that the judgment entered on April 30, 1931 ex parte, be and the same is hereby vacated and set aside and held for naught."

The respondent (plaintiff) contends that the petition did not set forth a meritorious defense and that it was therefore fatally defective. This contention is without merit. It is not necessary for the petitioner, in a proceeding like the instant one, to allege

here.

case would not have been tried." Under Penalton, a witness for the petitioner, testified that he was so obviously ill and represented the defendants in the manner that on April 30 he requested orders begin "for trial," with my client and I present on the first call of those cases I answered ready and I asked your Honor -- I said, 'Then I can do away is the Superior Court and rip a case and pass Honor said he could not hear the case today -- and I asked your Honor if you would not put it over to the next Fall. Your Honor said 'You can put it over to June 19, and then it would go over to the next calendar.' And I left the courtroom. I knew nothing of a judgment until my client received an execution and then I immediately served counsel with notice to have it vacated." A witness for the petitioner testified that the ex parte trial took place about 11:30 a. m. the same day. The plaintiff, recognized, introduced no evidence in rebuttal. The following is the crux of the court's reasoning the judgment:

"This cause coming on to be heard on motion of defendant on petition in return of a writ of coram nobis and the court having read said petition under oath, and having heard evidence of all parties and the statement of counsel for both plaintiff and defendant; and the court having jurisdiction of the parties hereto and the subject matter hereof.

"And it further appearing to the Court from the evidence that above entitled cause was called for trial on April 30, 1931 in Term 1931 City Hall before Mix Honor Judge Lampe and it appearing that the attorney for defendants requested said call, he was expecting for plaintiff and is apparent that the court continued said cause until June 19, 1931, and that such motion on the file aforesaid and it further appearing that the said cause was called at said time date for trial, by minute of which also an ex parte judgment was had; and it appearing that the court had no notice of the time of entering on April 30, 1931 ex parte, he and the same is hereby vacated and set aside and held for naught."

The respondent (plaintiff) contended that the petition did not set forth a meritorious defense and that it was therefore fatally defective. This contention is without merit. It is not necessary for the petitioner, in a proceeding like the instant one, to allege

that he had a meritorious defense to the original action, as the question of the merits of the original action is not involved in such proceeding. (See Reid v. Chicago Rys. Co., 231 Ill. App. 58, 81; Chapman v. North Am. Ins. Co., 292 Ill. 179, 188.) "The pleadings are original, the issues are distinct from the principal suit." (Jacobson v. Ashkinaze, 337 Ill. 141, 147.)

The plaintiff contends that the court had no jurisdiction to vacate the judgment entered on the showing which was made. We find no merit in this contention. See Toth v. Samuel Phillipson & Co., 250 Ill. App. 247,251-2, wherein the court said: "Whether the misinformation given by the clerk technically constitutes misprision we deem immaterial. The mistakes of fact upon which such a motion may be predicated are not confined to omissions or misprisions of the clerk. Here the mistake of fact was dismissing the case on the supposition that plaintiff had not appeared for trial, whereas he had, and that fact was unknown to the court when it entered the order. In principle the case is similar to that of Madden v. City of Chicago, 283 Ill. 166. It there appeared that on the general call of the calendar the case was stricken under a rule of court when plaintiff's attorneys did not appear and make known their request for trial. Such a request was made to the clerk but not correctly noted by him. After having been assured by the clerk that the request was understood plaintiff's attorneys left and were not present when the case was called. It was not only held to be such a mistake of fact as comes within the purview of said section, but the attorneys were warranted in assuming that the cause would be placed on the trial calendar and tried in due course by reason of the clerk's assurance. That the present case came up on the trial call and not under rules pertaining to a general call presents no valid distinction in principle between this case and that. The clerk is an officer

in principle between right and left. The clerk is an ultimate super-juror participating in a general self-investigation [illegible] remembrance. That the present case came up in the trial was not [illegible] trial endured in the course of the clerk's [illegible] were retained in remembrance should be placed in the [illegible] that he chose [illegible] of said machine, but the interests [illegible] the case was calling. It was not only [illegible] to be such a mistake of [illegible] Plaintiff's attorney left who were not [illegible] caged by him. After Dewitt Dunn entered [illegible] the clerk that the machine [illegible] for trial. Dunn's decision was made to the clerk but not [illegible] Plaintiff's attorney did not object and make known their [illegible] of the matter the case was ultimately [illegible] of opinion, 283 Ill. 122. It there appeared that no one [illegible] ordeal. In principle the case is similar to that of Perkins v. City [illegible] had, and it's fact was unknown to the court when it entered the [illegible] mistake that plaintiff had not exercised due [illegible], whereas he may be prejudiced are not confined to omissions or misjudgments of the clerk. Here the mistake of fact was eliminating the duty on the [illegible] misinformation given by the clerk constituted excusable elsewhere [illegible]. The mistakes of fact upon which such a motion [illegible] fraud in the conduct of the trial, whereas he [illegible] Dunn v. Chicago Title & Trust Co., 280 Ill. 494, 497-8, wherein the court said: "Whether the [illegible] to excuse the judgment entered on the showing which was made, it [illegible] no merit in this contention. See Toth v. Chicago Title & [illegible] the plaintiff exercised that due [illegible] (Dunn v. Chicago, 287 Ill. 142, 147.)

[illegible] large are original, the issues are distinct from the principal [illegible] dunn v. Chicago, 287 Ill. 142, 147.) The plaintiff [illegible] much proceeding. (See Toth v. Chicago Title & Trust Co., 280 Ill. 494, 497-8; Dunn v. Chicago, 287 Ill. 142, 147.)

of the court and it is his duty to note its orders that are to be subsequently spread of record. He was the proper one to consult as to the status of the case and was supposed to know and note the orders of the court, and we think plaintiff was warranted in relying upon his statement as to what they were and was not required to verify the same by consulting his minutes. The clerk, however, was mistaken and here as in the Madden case misled plaintiff and indirectly the court. We think, therefore, the case was properly reinstated." In Holbrook v. Lawton, 207 Ill. App. 497, where a number of authorities bearing upon the subject are cited, the court said: "A judge, as well as an attorney, may be misled by the fault of a clerk. * * * The tendency of the law in this State is to allow the motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court. As said in Brady v. Washington Ins. Co., 82 Ill. App. 380: 'A default of the clerk is one of the recognized grounds for a writ of error coram nobis.' Tidd's Practice, sec. 1137; Silverman v. Childs, 107 Ill. App. 522. In the latter case the court said: 'The ignorance of the court as to the facts arose from the neglect of the clerk to strike the case off the regular calendar when he placed it upon the short cause calendar. Such negligence of the clerk is sufficient ground for a writ of coram nobis, and authorized the court to pass upon the motion to set aside the judgment at a subsequent term.'" (See also Butterick Publishing Co. v. Goldfarb, 242 Ill. App. 228; Lewis v. Heywood-Wakefield Co., 254 Ill. App. 606 (Abst.); Warner v. Wende, 214 Ill. App. 431.)

We are satisfied that Judge Lupe allowed the ex parte trial because the clerk failed to call the attention of the court to the fact that the court had already continued the cause to June 19, 1931. This negligence of the clerk was a sufficient ground

for a writ of coram nobis. We agree with Judge Lupe that it would amount to a serious miscarriage of justice to permit the original judgment to stand.

The judgment order of June 26, 1931, should be and it is affirmed.

JUDGMENT ORDER OF JUNE 26, 1931, AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

for a writ of [illegible]. In return write [illegible] there is nothing
enough to a motion [illegible] [illegible] to direct the writing
judgment to stand.

The judgment dated at June 26, 1911, should be read it is
affirmed.

[illegible] dated on June 26, 1911, [illegible].

Gridley, J., and Morris, J., concur.

35541

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN GOHMAN and LOUIS FRANKLIN,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

117

266 I.A. 614

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

By this writ of error the plaintiffs in error seek to reverse an order of the Municipal court of Chicago denying their petition to vacate a judgment entered against them on January 2, 1931.

On December 26, 1930, a writ of scire facias was issued out of the Municipal court of Chicago directed against the plaintiffs in error, John Gohman and Louis Franklin, to show cause why a certain bond forfeiture in the sum of $2,000 should not be made absolute. The bond was executed by John Gohman as principal and Louis Franklin as surety. Service of the writ was had upon the plaintiff in error Louis Franklin in apt time. On January 29, 1931, the plaintiffs in error were defaulted and the forfeiture of the recognizance was made absolute and judgment for $2,000 and costs was entered against them. No appeal was taken or writ of error sued out to reverse that judgment. On February 5, 1931, the plaintiffs in error moved the court to vacate the judgment of January 29, 1931, which motion was then and there overruled. No appeal was taken or writ of error sued out to reverse that order. On August 21, 1931, the plaintiff in error Louis Franklin moved the court to vacate the judgment of January 29, 1931, and in support of said motion filed a "Petition to Vacate Judgment," which motion was overruled on August 21, 1931, and this writ of error is sued out to review the action of the trial court in that regard.

IN THE SUPREME COURT OF THE STATE
OF ILLINOIS,

Defendant in Error,

v.

JOHN DOMINIC and LOUIS FRANKLIN,

Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

266 I.A. 614

MR. JUSTICE EDWARDS DELIVERED THE OPINION OF THE COURT.

By this writ of error the plaintiffs in error seek to reverse an order of the Municipal Court of Chicago denying their petition to vacate a judgment entered them on January 2, 1923.

On December 26, 1922, a writ of scire facias was issued out of the Municipal Court of Chicago directed to the plaintiffs in error, John Dominic and Louis Franklin, to show cause why a certain bond forfeiture in the sum of $1,000 should not be made absolute. The bond was executed by John Dominic as principal and Louis Franklin as surety. Service of the writ was had upon the plaintiff in error Louis Franklin in due time. On January 26, 1923, the plaintiff in error made default and the forfeiture of the recognizance was made absolute and judgment for $1,000 and costs rendered against them. No appeal was taken or writ of error sued out to reverse such judgment. On January 2, 1923, the plaintiffs in error moved the court to vacate the judgment of January 26, 1923, which motion was then overruled. No appeal was taken or writ of error sued out to reverse such order. On January 27, 1923, "Petition to Vacate Judgment," which motion was substantially an original judgment of January 26, 1923, and in support of said motion filed a writ of error to reverse the judgment of January 2, 1923. The writ of error was issued on January 27, 1923, and in pursuance of said writ the plaintiffs in error have brought the cause to this court by writ of error.

The petition recites:

"Your petitioner, Louis Franklin, respectfully represents unto your Honor that on or about the 2nd day of January, A. D. 1931, a judgment was entered in the above cause in the sum of $2000.00 against your petitioner; that said judgment was so entered upon an alleged bond forfeiture of December 16th, 1930, in this court in case No. 2100923, State of Illinois vs. John Cohman, that on February 5th, 1930, a motion to vacate the judgment entered herein was overruled.

"Your petitioner further represents that on the 16th day of December, 1930, or at any time thereafter, was there a bond in existence in case No. 2100923 on which your petitioner was surety; that consequently there could have been no bond forfeiture; that no Scire Facias could legally issue and no judgment entered herein against your petitioner; that said judgment is void and of no effect and your petitioner respectfully presents to this Honorable Court the complete record in case No. 2100923 and case No. 370982, which said records are hereby made a part of this petition; that your petitioner has used due diligence in presenting this petition; that after February 5th, 1930, your petitioner retained counsel to present a petition to vacate said judgment and have a complete record made in case No. 2100923 and No. 370982, which said records your petitioner believes to be necessary in determining a motion or petition to vacate the said judgment; that the Transcript Department of the Court has been unable to locate the files in case No. 2100923 until recently and consequently your petitioner was unable to secure the complete record until the past ten days.

"Your petitioner further represents that on or about June 20th, 1928, he became surety on a bond on which one John Cohman was principal in case No. 2100923 then pending in the Municipal Court of Chicago, as by the record in said cause on file with the Clerk of this Court, reference being had thereto, will more fully appear, said bond being in the sum of $2000.00. That on the 23rd day of July, A. D. 1928, an order was entered in case No. 2100923, in which said John Cohman was defendant, by Hon. Judge John Sbarbaro, wherein said above mentioned bond on which your petitioner was surety was forfeited and a capias ordered for the arrest of the defendant, John Cohman.

"Your petitioner further represents that on August 7th, 1928, an order was entered therein by Hon. Judge John Sbarbaro, continuing a motion to vacate and set aside said forfeiture to the 10th day of August, 1928; that on said 10th day of August, 1928, an order was entered continuing case No. 2100923 until the 15th day of August A. D. 1928, at which time said cause was pending before Hon. Judge John Sbarbaro and an order entered therein making no ruling on said motion but again forfeiting a bond and ordering a capias, which your petitioner respectfully shows, and as more fully appears by the Records in said cause; reference being had thereto, was inadvertently entered and said bond having been forfeited on the 23rd day of July, 1928, that thereafter on the 12th day of June, A. D. 1929, an order was entered in case No. 2100923, by Hon. Judge William R. Fetzer, vacating the order of August 15th, 1928 wherein said bond was forfeited.

"Your petitioner further represents that upon notice to the States Attorney of Cook County, Illinois, and upon the sworn petition

The petition recites:

"Your petitioner, Anita Brandis, respectfully represents unto your Honor that on or about the 22nd day of January, A. D. 1931, a judgment was entered in the above cause in the sum of $2000.00 against your petitioner; that said judgment was so entered upon an alleged bond forfeiture of December 18th, 1930, in this court in case No. 230023, State of Illinois vs. John Wilson, that on February 6th, 1931, a motion to vacate the judgment entered therein was overruled.

"Your petitioner further represents that on the 12th day of December, 1930, or at any time thereafter, she there & bond in cause in case No. 230023 as bail for petitioner was surety; that subsequently there could have been no bond forfeiture; that no Notice Books could legally issue and no judgment entered thereon against your petitioner; that said judgment is void and of no effect and your petitioner respectfully presents to this Honorable Court the complete record in case No. 230023 and case No. 230022, which said records are hereto & part of this petition; that your petitioner was used due diligence in presenting this petition; that after February 6th, 1931, your petitioner retained counsel to present & petition to vacate said judgment and have a complete record made in case No. 230023 and No. 230022, which said records your petitioner believes to be necessary in determining & petition or petition to vacate the said judgment; that the Transcript Department of the court has been unable to locate the files in case No. 230023 until recently and subsequently your petitioner was unable to secure the completed record until the past ten days.

"Your petitioner further represents that on or about June 20th, 1932, he became surety on a bond on which one John Dobson was principal in same No. 230023 then pending in the Criminal Court of Cook County, as by the record in said cause on file will fully appear. That said bond being in the sum of $2000.00. That on the 23rd day of July, A. D. 1932, an order was entered in said cause No. 230023, in which said John Dobson was defendant, by Hon. Judge Thomas Courtney, whereby said above mentioned bond as bail bond was declared forfeited and a capias ordered for the arrest of the defendant, John Dobson.

"Your petitioner further represents that on August 7th, 1932, an order was entered therein by Hon. Judge John Sbarbaro, continuing a motion to vacate and set aside said forfeiture to the 10th day of August, 1932; that on said 10th day of August, 1932, an order was entered continuing same to [illegible] 1932, at which time said cause was pending before Hon. Judge John Sbarbaro and an order entered therein making no ruling on said motion but again forfeiting a bond and ordering a capias, which said petitioner respectfully shows, and as more fully appears by the records in said cause; reference being had thereto, was instantly entered and said bond having been forfeited on the 23rd day of July, 1932, that thereafter on the 12th day of June, A. D. 1933, an order was entered in case No. 230023, by Hon. Judge William H. Fetzer, vacating the order of August 12th, 1932, whereby said bond was forfeited.

"Your petitioner further represents that upon notice to the State's Attorney of Cook County, Illinois, and upon the above petition

of your petitioner filed with the Clerk of this Court on June 12th, 1929, reference being had thereto, said case No. 2100923 came on for hearing before Hon. Judge William R. Fetzer, one of the Judges of the Municipal Court of Chicago, Ill. and upon a hearing had before said Judge and Court, an order was entered therein on said 12th day of June, 1929, by Hon. Judge Fetzer, vacating and setting aside the forfeiture of said bond, on which your petitioner, was surety, and vacating the order of Hon. John Sbarbaro, entered therein on July 23rd, 1928, in which said bond was declared forfeited, said order and the record of same being on file in the office of the Clerk of this Court, reference being had thereto, and made a part of this petition.

"Your petitioner further represents that said order of June 12th, 1929, is a final order of this Honorable Court, and as such final order could only be attacked by parties in interest in case No. 2100923 by appeal to the Appellate Court or by Writ of Error; that said order was entered upon Notice and Petition of your petitioner and that said petition recited sufficient grounds to vacate the bond forfeiture of July 23rd, 1928; that said order found the facts contained in said petition to be true and no denial of said facts were made by answer to the said petition of your petitioner; that no further order was entered in said cause in connection with said bond forfeiture until the 21st day of August, A. D. 1930.

"Your petitioner further represents that on the 21st day of August, 1930, an order was entered in case No. 2100923, by Hon. Judge Holmes giving leave to the States Attorney to file an Amended Petition; that from the records in said cause, reference being had thereto, it appears that said order was entered without notice and that no original petition was on file; that an Amended Answer to a Petition was thereupon filed and hearing continued to September 5th, 1930; that the order allowing the filing of said Amended Petition and the filing of an Answer to the Petition to Louis Franklin are of no effect; that no answer could be filed to the Petition of Louis Franklin to vacate a bond forfeiture inasmuch as an order had been entered upon the said petition vacating the bond forfeiture of July 23rd, 1928. That such procedure is illegal, a fraud upon the rights of your petitioner; and an attempt upon the part of this Honorable Court by one of its judges to usurp the powers of the Appellate and Supreme Courts of Illinois; that said order of Judge Holmes and the filing of said Amended Answer to the Petition of Louis Franklin, filed on June 12th, 1929, to vacate said bond forfeiture of July 23rd, 1928, on which an order had been entered, violated all known principles of procedure; that the legal effect of filing said Amended Answer after a final order had been entered on the said Petition is that no orders could be entered by this Honorable Court, and that any such orders entered are mere nullity and that same should be expunged from the records; that before a further hearing could be had upon the petition filed on June 12th, 1929, it would have been necessary to properly vacate and set aside the order of June 12th, 1929 entered upon said petition; and your petitioner respectfully refers this Honorable Court to the records on file in case No. 2100923 with the Clerk of this Court, reference being had thereto, and further refers to the Rules and Procedure of the Municipal Court of Chicago.

of the Municipal Court of Chicago.

"Your petitioner further represents that thereafter on the 3rd day of December, 1930, an order was entered in case No. 2100923 by Hon. Judge George B. Holmes; reciting therein, among other things, that said cause came on for hearing upon the petition of Louis Franklin, to vacate the judgment heretofore entered on a Scire Facias in the above entitled cause and that referring to said cause it is No. 370982, and the Amended Answer of the People of the State of Illinois; that it appears that no order was entered in case No. 2100923; that, however, said order recites that the order entered by Judge Fetzer on the 12th day of June, 1929, was improperly entered and it is hereby vacated and expunged. That said order of Judge Fetzer on June 12th, 1929, vacated the bond forfeiture of July 23rd, 1928.

"Your petitioner further represents that Hon. Judge Holmes found that all of the orders entered in case No. 2100923 were for some reason void and based his decision upon the Amended Answer filed therein, alleging that the motion made and entered therein on August 7th, 1928 to vacate the bond forfeiture of July 23rd, 1928, before Judge Sbarbaro, was still pending and undisposed of. That thereupon said Judge Holmes entered an order in case No. 2100923 as follows 'The motion of August 7th, 1928, to vacate Bond Forfeiture of July 23rd, 1928 is allowed.'

"Your petitioner further represents that it now appears from the records on file with the Clerk of the Municipal Court of Chicago, in case No. 2100923 wherein one John Gohman was the defendant, and wherein your petitioner was surety on the bond of said defendant, reference being had to said records, and same being made a part of this petition, that the order of July 23rd, 1928, declaring said bond forfeited, has been vacated by the order of Judge Fetzer on June 12th, 1929, and again vacated by the order of Judge Holmes on the 3rd day of December 1930, and your petitioner respectfully represents unto this Honorable Court, that regardless of the validity or invalidity of said orders, for the purposes of this petition one or both of said orders should be considered as binding upon this court; that the effect of said orders is that the bond in the sum of $2000.00 executed by your petitioners in case No. 2100923, wherein one John Gohman was defendant and principal on said bond, is void and should be held for naught and that any further proceedings, including the above entitled cause, should be held for naught and void and of no effect.

"Your petitioner further represents that on Dec. 3rd, 1930, said Judge Holmes, entered an order in case No. 2100923, wherein said order recited that the case on the charge of bastardy be sent to the Chief Justice for re-assignment, that thereafter on the 16th day of December, 1930, an order was entered therein by Judge Padden Ordering The Bond Forfeited that the scire facias in the above cause issued as a result of said order and the judgment entered herein is upon the forfeiture of said bond on December 16th, 1930.

"Your petitioner further represents that there being no bond in existence on December 16th, 1930, no forfeiture could have been ordered; that all proceedings herein are void and of no effect.

"Your petitioner further represents that thereafter on the 3rd day of December, 1923, an order was entered in cause No. 21/0023 by Hon. Judge George D. Kelsey, reciting [illegible]. Among other things, that said cause came on for hearing upon the petition of Louis Frankin, to vacate the judgment heretofore rendered on a [illegible] in the above entitled cause and that [illegible] said cause it is No. 21/0023, and the Honorable Owner of the Judge of the State of Illinois that it appears that no order was entered in said No. 21/0023; that, however, said order recites that the order entered by Judge Kelsey on the 11th day of June, 1923, was [illegible] on the 3rd day of July, 1923.

"Your petitioner further represents that Hon. Judge Holmes found that all of the orders entered in case No. 210/023 were for some reason void and based his decision upon the [illegible] Kelsey filed therein, stating that the motion made and entered thereto on August 11th, 1923 to vacate the said [illegible] of July 23rd, 1923, before Judge Dunbaum, was still pending and undisposed of. That thereupon said Judge Holmes entered an order in case No. 21/0023 as follows 'The motion of August 11th, 1923, to vacate said [illegible] of July 23rd, 1923 is allowed.'

"Your petitioner further represents that it now appears from the records on file with the Clerk of the Municipal Court of Chicago, in case No. 21/0023 wherein one John Goldman was the defendant, and wherein your petitioner was surety on the bond of said defendant, reference being had to said records, and make same a part of this petition, that the order of July 23rd, 1923, [illegible] said bond forfeited, has been vacated by the entry of Judge Kelsey on June 11th, 1923, and again vacated by the order of Judge Holmes on the 3rd day of December 1923, and your petitioner respectfully represents unto this Honorable Court, that [illegible] of the validity or invalidity of said orders, for the purposes of this petition one or both of said orders should be [illegible] by binding upon this court; that the effect of said action is that the bond in the sum of $2000.00 executed by [illegible] in case No. 21/0023, wherein one John Goldman was defendant and [illegible] on said bond, is void and should be held for naught and that any further proceedings, including the above entitled cause, should be held for naught and of no effect.

"Your petitioner further represents that on Dec. 11th, 1923, said Judge Holmes, entered an order in case No. 21/0023, wherein said order recited that the case on the docket of Secretary of the said to the Chief Justice for re-assignment, that thereafter on the 15th day of December, 1923, an order was entered thereon by [illegible] Judge Sabath [illegible] that the said Judgment entered by the above named in a result of said order and the judgment entered herein upon the forfeiture of said bond on [illegible], 1923.

"Your petitioner further represents that there being no bond in existence on December 14th, 1923, no forfeitures could have been entered; that all proceedings herein are void and of no effect.

"Wherefore, your petitioner, Louis Franklin, prays that the judgment heretofore entered herein on the 2nd day of January, A. D. 1931, in Scire Facias no 372307, be vacated and set aside, the execution quashed, and for such other and further relief as to your honor shall seem just."

As the petition of the plaintiff in error was filed approximately six and one-half months after the judgment of January 29, 1931, was entered, it follows that it was based on section 21 of the Municipal Court Act, Cahill's Ill. St. ch. 37, par. 409, which provides that there shall be no stated terms of the Municipal court and that a judgment of that court shall not be vacated after thirty days except upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; "Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court." This section intends that where thirty days have elapsed after a judgment is entered in the Municipal court, that court is without power to vacate or set it aside, except that it may be vacated or set aside where a motion is made under section 89 of the Practice Act, Cahill's St. ch. 110, par. 89, showing sufficient grounds under that section, or it may be vacated and set aside upon petition filed which alleges facts which would be sufficient to cause the judgment to be vacated and set aside by a bill in equity if the same were filed in the Circuit or Superior court. In the instant case the motion to vacate was determined upon the verified petition, and the sole question is, Did the petition set up such facts as would

the main question is whether Mr. Justice Holmes was right when he said that a writ of error to the Supreme Court of the United States was "practically a matter of right". In the instant case, the petition for writ of certiorari was denied by the Supreme Court of the United States. Under Rule 38, paragraph 5(b) of the Rules of the Supreme Court of the United States, a petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, although neither controlling nor decisive, should be considered: (1) Where the state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (2) Where a state court has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. (3) Where a state court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. (4) Where a state court has decided an important question of local law which should be settled by this Court, or has decided a federal question in a way that conflicts with the applicable local law as announced by this Court. (5) Where a petition for writ of certiorari presents a question of substance not theretofore determined by this Court, or presents the question in a way that conflicts with the applicable decisions of this Court, and the state court has entered a judgment or decree which may be reviewed on writ of certiorari, but has failed to decide the federal question presented, or has decided it in a way probably not in accord with applicable decisions of this Court. (6) Where a state court has entered a judgment or decree which may be reviewed on writ of certiorari, but has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (7) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of local law which should be settled by this Court, or has decided it in a way that conflicts with the applicable local law as announced by this Court. (8) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (9) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (10) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (11) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (12) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (13) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (14) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (15) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (16) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (17) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (18) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (19) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way that conflicts with the applicable decisions of this Court, and has also decided an important question of federal law which has not been, but should be, settled by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. 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warrant the court in vacating the judgment? The plaintiffs in error do not state that the petition was intended as one in the nature of error coram nobis and advance no argument why it should be considered as such a proceeding. Under the allegations of the petition it is clear that error coram nobis would not lie. See Marabia v. Thompson Hospital, 309 Ill. 147, where the subject of what errors may be corrected by motion under section 89 of the Practice Act is discussed at length. Nor does the plaintiff in error in his petition bring himself within the rule announced in McCord v. Briggs & Turivas, 338 Ill. 158, 166, and Jacobson v. Ashkinaze, 337 Ill. 141, 146.

Does the petition make out a case if it be treated as a pleading in the nature of a bill in equity? The well settled rule governing such a bill is that a diligent defendant who, without negligence or fraud on his part, has been prevented by accident or mistake from presenting a good and meritorious defense to a cause of action may have the judgment entered against him set aside by making proper application to a court of equity. Testing the allegations of the petition by this rule, it is clear that the plaintiff in error has not therein made out a case that would warrant equity in vacating the judgment. Even if the allegations of the petition set up a good and meritorious defense to the cause of action, which they do not, nevertheless, it affirmatively appears that the plaintiff in error was not prevented by accident, mistake or fraud from presenting the defense he seeks to interpose by the petition. Moreover, he did not file his petition until six and one-half months after his motion to vacate had been denied and for his negligence in that regard a court of equity would refuse to vacate the judgment on that ground alone. (See Welley v. Klein, 257 Ill. App. 171, 175.)

The judgment of the Municipal court of Chicago of August 21, 1931, is affirmed. AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

[illegible] the judgment of the Municipal Court of [illegible]
[illegible] 31, 1951, is affirmed.

The judgment of the Municipal Court of Oakley is affirmed with costs. (See Article VI, Sec. 11, Cal. Const. 1879, 1911, 1926.)

Appellant's petition for a hearing by the Supreme Court was denied June 27, 1951. Carter, J., and Traynor, J., dissented.

Appellant's petition for a hearing by the Supreme Court was denied June 27, 1951. Carter, J., and Traynor, J., dissented.

The judgment of the Municipal Court of Oakley is affirmed with costs. (See Article VI, Sec. 11, Cal. Const. 1879, 1911, 1926.)

[illegible] one-half months after his motion to vacate had been denied and for [illegible] his motions in that regard a court of equity would [illegible] vacate the judgment on that ground alone. (See Article VI, Sec. 11, Cal. Const. 1879, 1911, 1926.)

petition. However, he did not file his petition until six and [illegible] or fixed time prescribing the defense be held to interpose by the [illegible] that the plaintiff in error was not precluded by a default, whether motion, which they do not, necessarily, it affirmatively appears [illegible] petition set up a good and meritorious defense to the cause of [illegible] in vacating the judgment. Even if the allegations of the [illegible] fail in error has not thereby made out a case that would warrant [illegible] allegations of the petition by this rule, it is clear that the plaintiff [illegible] wasting proper application to a court of equity. Testing the [illegible] of action only does the judgment entered against him not result by [illegible] mistake from presenting a good and meritorious defense to a cause [illegible] pleading in the nature of a plea in equity. The well settled rule [illegible] does the petition make out a case if it be treated as a [illegible] Superior Court, 224 III. 341, 349, 79 N.E. 561, 563; Record v. Bridges & Taylor, 238 Ill. 189, 196, and Jacobson v. [illegible], 251 Ill. 141, 146.

[illegible] error in his petition bring himself within the rule announced in [illegible] of it is discussed as follows. Nor does the plaintiff in [illegible] of what errors may be assigned by motion under section 89 of the Practice Act, Smith-Hurd Ill. Rev. Stat. 1949, ch. 110, par. 92, Jacobson v. Superior Court, 224 Ill. 341, 346.

Does the petition make out a case if it be treated as a pleading in the nature of a bill in equity? The well settled rule [illegible] amount a bill is that a sufficient defendant who, without [illegible] modifications or fraud on his part, has been deprived by accident or mistake from presenting a good and meritorious defense to a cause of action only does the judgment entered against him not result by [illegible] wasting proper application to a court of equity. Testing the allegations of the petition by this rule, it is clear that the plaintiff in error has not thereby made out a case that would warrant the court in vacating the judgment. The plaintiff in

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118 17

RUTH R. LIGHTHALL,
Appellee,

v.

I. D. OPAT,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

266 I.A. 614

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendant for alleged malicious prosecution. The appearance of the defendant was entered by Attorney W. G. Lesemann (who also appears as the attorney of the defendant in this court) and a plea of the general issue was filed. On February 6, 1931, plaintiff's attorney served notice on defendant's attorney that plaintiff desired the case to be placed upon the trial calendar and would file notice of such intention pursuant to the rules of the court. On May 18, 1931, the cause was regularly reached for trial but the defendant did not, in person or by counsel, appear, and as neither of the parties had made a demand for trial by jury, as required by statute, the cause was heard by the court, who, after hearing all of the evidence adduced, found the defendant guilty and assessed the plaintiff's damages at the sum of $400. Judgment was entered upon the finding. On May 22, 1931, the defendant, by "William G. Lesemann, Attorney for defendant," served notice that on May 23, 1931, he would move the court to vacate the order of default and judgment and in support of the motion would present two affidavits, one of Attorney Lesemann and the other of the defendant. On May 23, 1931, the motion came on to be heard and after a consideration of the same it was denied. The affidavit of Attorney Lesemann set up that "at the time notice in said cause was served upon this

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PHILIP B. KINGSLEY,

Appellee,

A.

I. I. COLT,

Appellant.

266 I.A. 614

IN JUSTICE COURTS INITIATED THE OFFICIAL OF THE COURT.

The plaintiff sued the defendant for alleged violations

[illegible] The appearance of the defendant was entered by

[illegible] O. Isenman (who also appears as the attorney of the

defendant in this court) and a plea of the general issue was filed.

On February 6, 1922, plaintiff's attorney served notice on defen-

ant's attorney that plaintiff desired the case to be placed upon

the jury calendar and would file notice of such intention pursuant

to the rules of the court. On May 19, 1922, the cause was regularly

reached for trial but the defendant did not, in person or by counsel,

appear, and no member of the parties had made a demand for trial

by jury, as required by statute, the cause was heard by the court,

who, after hearing all of the evidence offered, found the issues

[illegible] and assessed the plaintiff's damages at the sum of $400.

Judgment was entered upon the finding. On May 23, 1922, the defend-

ant, by William O. Isenman, attorney for defendant," served notice

that on May 23, 1922, he would move the court to vacate the order of

default and judgment in accordance of the motion would present the

affidavit, one of [illegible] and the other of the defendant.

On May 23, 1922, the motion came on to be heard and after a consider-

affiant to have the matter set for trial this affiant was so engaged as to be unable to give his attention to this case. That affiant so advised the defendant and gave to him a copy of said notice together with copies of pleadings herein and requested the said I. D. Opat to secure additional counsel, advising him that this affiant would be unable to check or watch the case on the call; * * * that the engagement above referred to terminated on Saturday the 16th day of May, 1931 and that on or about the hour of 12 o'clock noon, on the 18th day of May this affiant checked the records in this cause and then learned for the first time that the matter had been heard on the morning of the 18th of May, 1931, and that an order of default had been entered against the defendant and ex-parte hearing had a judgment entered in favor of plaintiff; * * * that he attempted immediately thereafter to get into communication with the defendant, I. D. Opat, and that he was unable to do so until the 22nd day of May, 1931. And that immediately upon getting into communcation with said I. D. Opat notice of motion to vacate said order of default and judgment and set said cause for hearing was made and entered." The affidavit of the defendant set up that after he received a copy of the notice from his attorney he was advised by the latter that he could not take care of the matter or give it any attention, and that defendant agreed with his attorney that he, the affiant, would watch the cause and before it was ready for trial would select an attorney to handle it at the trial for him; "that thereafter he called at the office of the clerk of the court on three separate occasions with this title and general number of said cause, that he spoke with an employee of the office of the clerk of this court and was advised that this cause would not be released for trial until after the summer vacation and that he this affiant could forget about it until September; * * * that he relied upon such representation so received

client to have the matter set for trial this defines was no
assigned so to be unable to give his attention to this case. That
matters so evidence the defendant and have to file a copy of said
notice together with copies of pleadings herein and reference the
said I. E. Cpet to secure additional counsel; stating the that
this client would be unable to check or watch the case on the call;
* * * that the undersigned whose referred to hereinafter as Saturday
the 16th day of May, 1921 and that on or about the hour of 12 o'clock
noon, on the 18th day of May this client checked the records in this
cause and then learned for the first time that the matter has been
heard on the morning of the 18th of May, 1921, and that an order of
default had been entered against the defendant and in favor of plaintiff
had a judgment entered in favor of plaintiff * * * that he attempted
immediately thereafter to get into communication with the defendant,
I. E. Cpet, and that he was unable to do so until the 20th day of
May, 1921. And that immediately upon getting into communication with
said I. E. Cpet notice of motion to vacate said order of default and
judgment and set said cause for hearing was made and entered." The
affidavit of the defendant set up that after he received a copy of
the notice from his attorney he was advised by the latter that he
could not take care of the matter or give it any attention, and that
defendant agreed with his attorney that he, the client, would watch
the cause and before it was ready for trial would select an attorney
to handle it as the trial for him. "that thereafter he called at the
office of the clerk of the court on three separate occasions with
this title and County number of said cause, that he spoke with an
employee of the office of the clerk of this court and was advised
that this cause would not be reached for trial until after the
summer vacation and that he this affiant could forget about it until
September; * * * that he called upon said representation on received

and had no knowledge that the case was set for trial or heard and judgment entered until the 22nd day of May, 1931." Section 68 of the Practice act, Cahill's St. ch. 110, par. 68, leaves to the discretion of the trial court the matter of opening defaults and vacating and modifying judgments within the term at which a judgment may be rendered, and it is the settled rule in this state that a motion to set aside a judgment, made within the term, is addressed to the sound legal discretion of the court and that unless there has been a palpable abuse of such discretion the Appellate courts will not interfere. (Eggleston v. Royal Trust Co., 205 Ill. 170.) Many other cases to the same effect might be cited. It is also the settled law of this state that the moving party must show a meritorious defense and that he has not been guilty of negligence. It is also the settled law of this state that "although a defaulted party has a meritorious defense, a default will not be set aside if he or his attorney has been guilty of negligence." (Flaff v. Pacific Express Co., 251 Ill. 243, 247; Mitsche v. City of Chicago, 280 Ill. 268, 271.) It will be noted that Attorney Lesemann, after service of notice upon him, did not withdraw his appearance in the case and that he merely asked the defendant "to secure additional counsel;" that "at the time notice in said cause was served upon this affiant to have the matter set for trial this affiant was so engaged as to be unable to give his attention to this case." The nature of the engagement is not stated, but it does appear from the affidavit that the engagement was terminated on May 16, 1931, and that he took no steps to ascertain what had been done with the cause until noon of May 18, when he learned that the judgment had been entered on the morning of that day. "An attorney who has entered his appearance of record in a cause for a client pursuant to the latter's authority may not terminate his relationship with his client until there is

a withdrawal of his appearance entered of record by leave of court. (Hollan v. Kepner, 297 Ill. 332; Krieger v. Krieger, 221 id. 479.)" Jacobson v. Ashkinaze, 337 Ill. 141, 148.) There is nothing in the affidavit to warrant the assumption that the engagement of the attorney was of a legal nature. However, an attorney's press of legal business will not excuse his negligence. (See Schultz v. Meiselbar, 144 Ill. 26.) In neither affidavit is there any showing of a meritorious defense, and it is clear that the order of the trial court in denying the motion was the only one that could be justified under the showing made by the defendant. The defendant had the right to appeal from this order denying the motion to vacate, but he did not exercise that right. It is apparent that he recognized the insufficiency of the two affidavits, for on May 28, 1931, within term time, he again moved the court to vacate the judgment and on the same day he filed with the clerk of the court an affidavit of Harvey M. Adams and an "amended affidavit" of the defendant. The substance of the affidavit of Adams is that he had known the defendant for about two years and had represented him "in several matters;" that after the defendant was summoned in the instant cause he asked the affiant to "handle" the case for him; that the affiant informed the defendant that he would require a retainer of $200 in the cause and that the defendant thereupon informed the affiant that "due to financial reverses, he could not afford to pay a retainer, but that he had a lawyer who was a friend of his, who would enter his appearance without charge, and that later on when he," the defendant, "was able to raise some money, he would then come back and ask your affiant or the members of his firm to participate in the trial of the case." The amended affidavit of the defendant sets up that when he was informed by attorney Lesemann that the latter

was busy and would not be able to handle the matter, the defendant was in no position to complain because of the fact that he had not paid any money to Lesemann; "that he endeavored in the best way that he knew how to keep track of and follow said case, so as to know when the same was called for trial, but that due to his inexperience in said matters, the case was called for trial and tried in his absence ex-parte, on the 18th day of May, 1931; * * * that it is of his belief that he has a good and substantial defense to the claims of the plaintiff herein; * * * that on to-wit, January 30, A. D. 1930, and for some time both before and after said date, he was the lessee of certain premises known as 608-610 Groveland Park, located in Chicago, Cook County, Illinois, that he sublet said premises to a Mr. & Mrs. James Fenton, who it was understood were renting a portion of the premises for the purpose of running a sanitarium; that at the time they moved in, the plaintiff in the above entitled cause, Ruth R. Lighthall, occupied said premises with the Fentons'; that said Ruth R. Lighthall held herself out to be a medical doctor, but your affiant alleges that she is not and never was a duly licensed doctor of medicine; * * * that shortly after the occupancy of said premises by the said Mr. and Mrs. James Fenton and Ruth R. Lighthall, that your affiant discovered many and numerous illegal practices occurring in and about said premises, and that he received notice from the Health Department of the City of Chicago, that such practices must cease; * * * that he so informed both Mr. and Mrs. James Fenton and Ruth R. Lighthall, but that they continued to occupy said premises and continued the said practices; that as the result of same, a great deal of hard feeling arose and the said Ruth R. Lighthall and her associates informed your affiant to 'keep his mouth shut or that something would happen to him,' and that furthermore, he was interfering with their getting a license to run the sanitarium, and that

forced with their getting a license to run the sanitarium, and that
accomplish nothing by them," and that furthermore, he was in-
associates informed Dave Ellis to 'keep his mouth shut or that
deal of bad feeling arose and the said Ruth E. Lightfoot and Mar
and continued the said premises; that as the result of same, a final
and Ruth E. Lightfoot, but that they continued to occupy said premises
must cease; * * * that he so informed both Mr. and Mrs. James Fenton
from the Health Department of the City of Chicago, that many promises
occurring in and about said premises, and that he received notice
that Dave Ellis discovered many and numerous illegal practices
premises by the said Mr. and Mrs. James Fenton and Ruth E. Lightfoot;
that said Ruth E. Lightfoot held herself out to be a medical doctor,
doctor of medicine; * * * that shortly after the ownership of said
Dr. Mrs. & Mrs. James Fenton, who it was understood were handling a
portion of the premises for the purpose of running a sanitarium;
that at the time they moved in, the plaintiff in the above entitled
cause, Ruth E. Lightfoot, occupied said premises with the Fentons';
issues of certain premises known as 608-610 Roosevelt Road, located
in Chicago, Cook County, Illinois, that he united said premises by
a Mr. & Mrs. James Fenton, who it was understood were handling a
portion of the premises for the purpose of running a sanitarium;
that at the time they moved in, the plaintiff in the above entitled
cause, Ruth E. Lightfoot, occupied said premises with the Fentons';
that said Ruth E. Lightfoot held herself out to be a medical doctor,
doctor of medicine; * * * that shortly after the ownership of said
premises by the said Mr. and Mrs. James Fenton and Ruth E. Lightfoot;
that your affiant discovered many and numerous illegal practices
occurring in and about said premises, and that he received notice
from the Health Department of the City of Chicago, that many promises
must cease; * * * that he so informed both Mr. and Mrs. James Fenton
and Ruth E. Lightfoot, but that they continued to occupy said premises
and continued the said practices; that as the result of same, a final
deal of bad feeling arose and the said Ruth E. Lightfoot and Mar
associates informed Dave Ellis to 'keep his mouth shut or that
exemption would happen to him,' and that furthermore, he was in-
forced with their getting a license to run the sanitarium, and that

they would not pay any rent until they got a license; * * * that on the 30th day of January, A. D. 1930, the plaintiff did attack your orator, as was charged before Judge Max Luster; that he discussed the matter with an Assistant States Attorney of Cook County, who advised him to apply to the Court for an order to issue a warrant; that he then, with the Assistant States Attorney, appeared in the courtroom of Judge Max Luster, then judge of the Municipal Court of Chicago, to apply for said warrant; that at the time of his appearance there, he saw the said plaintiff, Ruth R. Lighthall, Marie Fenton, Julius G. Greenebaum and others, emerging from the chambers of the said Judge Max Luster; that he applied for said warrant while the said Ruth R. Lighthall was in the courtroom, and that Judge M. Luster said in affiant's hearing and to the others, 'Why apply for a warrant, I will give him one;' that upon the hearing of said cause, the said Judge Max Luster heard the testimony of your affiant and one other witness, Frank Martel, both of whom testified to an assault made upon your affiant, and the said Judge Max Luster, without questioning anyone else or hearing any other testimony, arbitrarily stated that he did not believe the testimony and discharged the defendant; * * * that he (affiant) took legal steps to endeavor to out the said Ruth R. Lighthall and the Fentons' from said premises, and that subsequently thereto, the defendant, Ruth R. Lighthall, procured several warrants against your affiant, in which she caused the arrest of your affiant, and on which each and every one of them, your affiant was discharged; * * * that he was repeatedly threatened by the said Ruth R. Lighthall that if he did not stop interfering with their business that he would 'get his;' * * * that on or about, to-wit, the 26th day of March, A. D. 1930, while he was in the hall-way going up to his apartment, that your affiant was slugged and beaten over the head and that the

said Ruth R. Lighthall, took One Thousand Dollars which he had in his pocket, from the person of your affiant, that as a result and by reason of said slugging, your affiant was removed to and confined to the Chicago Memorial Hospital for five days, and that subsequently he was compelled to go to the Henrotin Hospital because of his condition, under Dr. Graham's orders, where he remained for eight days; * * * that since that time he has been ailing and unable to take care of his business, and because of said facts has become so financially involved and embarrassed, as to be unable to obtain money to employ counsel; that it is because of these facts that he was without funds to employ counsel to watch his case for him." The second motion came on to be heard and on June 13, 1931, an order was entered denying the motion to vacate the judgment. It is from this order that the defendant has appealed. The plaintiff has failed to file an appearance or brief in this court.

For aught that appears in the two affidavits filed in support of the second motion, all of the matters therein set forth were within the knowledge of the defendant when the first motion to vacate was made. In Herch v. Lazzarini, 192 Ill. App. 462, where a similar state of the record was present, the court, after holding that the affidavits introduced in support of a motion to vacate a judgment failed to state any facts which should have moved the court to grant the same, said: "The insufficiency of the affidavit was evidently recognized by plaintiff in error, when, on June 20, 1913, he filed another affidavit in support of another motion then made by him to vacate and set aside said judgment. The matters set forth in the affidavit filed in support of the second motion made by plaintiff in error to vacate and set aside said judgment were all within his knowledge when he made the affidavit in support of the first motion made by him, and we are unaware of any rule of procedure or practice which, under such circumstances, warrants a party in making a second motion after

or practice

a prior like motion has been overruled by the court. The motion of June 20, 1913 (the second motion), was for this reason properly overruled." But for the purposes of this appeal we will assume that the defendant was within his rights when he made the second motion and that the court was called upon to determine the sufficiency of the affidavits in support of the same. No reasonable excuse was set up in either of the two affidavits that would justify the gross negligence of Attorney Lesemann and the defendant. For that reason alone the court was justified in denying the second motion to vacate. Much of the matter set up in the amended affidavit of the defendant had no relevancy to the charge made by the plaintiff in her declaration and therefore did not tend to show that the defendant had a meritorious defense to that charge. As to that part of the amended affidavit of the defendant in which he seeks to justify the arrest of the plaintiff upon the ground that he was advised to take such action by an assistant state's attorney of Cook county, it is the law that before a defendant can justify an arrest upon the ground that the defendant caused the same upon the advice of counsel it must appear that the defendant made a full and fair statement of all of the facts and circumstances connected with the affair to counsel. All that the defendant sets up is that "he discussed the matter with an Assistant States Attorney of Cook County, who advised him to apply to the Court for an order to issue a warrant." Non constat, he may have made a false statement to the assistant state's attorney as to what occurred on January 30, 1930. As to the occurrence of that date, all that the defendant states is, that "the plaintiff did attack your orator, as was charged before Judge Max Luster." This is a mere conclusion of the defendant. In order to show that a defendant has a good defense to the action on the merits the facts must be stated directly, not inferentially, specifically and not generally. (Eggleston v. Royal Trust Co.,

specifically and generally." (Jefferson v. Grand Times Co.,
the entire case needs be tested directly, not indirectly,"
In order to show that a defendant has a good defense to the petition on
before Judge Blue Dueber." This is a mere conclusion of the defendant.
ceeded in," that "the plaintiff did attack Jane Cooper," as was charged
Mo," 1920. We do the occurrences of that date, all that the defendant
by the defendant's statement as to what occurred on January
by items & accounts." Jon objected, he has made a false statement
at Cook County, who advised him to reply to the Court for an order
up in that "he discussed the matter with an insurance claims attorney
connected with the affair to counsel. All that the defendant made
a full and fair statement of all of the facts and circumstances
upon the notice of contest it must appear that the statement made
can justify an appeal upon the ground that the defendant caused the
state's attorney of Cook county, it is the law that before a defendant
show the Court that he was advised to take such action by an attorney
the defendant in which he seeks to justify the attack of the plaintiff
defense to that charge. As to that part of the answer alleging of
and therefore did not tend to show that the defendant had a meritorious
ing to relevancy to the charge made by the plaintiff in her declaration
that of the matter set up in the amended affidavit of the defendant
clined the court was justified in denying the second motion to vacate.
negligence of attorney Isaacson and the defendant. The first record
set up in either of the two affidavits that would justify the grant
the affidavits in support of the same. No reasonable excuse was
and that the court was called upon to determine the sufficiency of
the defendant was within his rights when he made the second motion
of June 20, 1922 (the second motion), and for this reason properly
a prior like motion has been overruled by the court. The motion

supra, p. 178; Roberts v. Corby, 86 Ill. 182; Brewer & Hoffman Brewing Co. v. Lonergan, 63 Ill. App. 28; Fitzgerald v. Power, 225 Ill. App. 118, 120-1.) As stated in the Eggleston case, a party must state the facts, so that the court may determine if he has a good defense to the action on the merits.

After a careful examination of this record we are satisfied that the judgment order appealed from should be affirmed and it is accordingly so ordered.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

_____, p. 178; _Johnson v. Davis_, 92 Fla. 1001; _Brown & Hoffman Produce Co. v. Jacksonville_, 61 Fla. 102; _Tillman v. Davis_, 232 Ill. App. 124, 125-7.) In marked in the _Lockhart_ case, a party must state the facts, or else the court may dismiss it because a good defense to the motion on the merits.

After a careful examination of this record it appeared that the judgment order appealed from should be affirmed and it is accordingly so ordered.

AFFIRMED.

Crabtree, P. J., and Turner, J., concur.

35630

OLAF NELSON,
Appellant,

v.

EDWARD HLAVKA,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

266 I.A. 615

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Olaf Nelson, brought an action for malicious prosecution against the defendant, Edward Hlavka, and on May 1, 1931, an ex parte trial resulted in a verdict in favor of the plaintiff for $1,000 and judgment immediately followed. By its answer to a special interrogatory the jury found that the defendant was guilty of wilful and malicious conduct. On July 31, 1931, the defendant filed a petition in the nature of a writ of error coram nobis praying that the judgment order be vacated and set aside. The plaintiff filed a general demurrer to the petition, which was overruled, and the plaintiff electing to stand by his demurrer the judgment of May 1, 1931, was set aside and vacated. From this last order the plaintiff has appealed.

The verified petition alleges, inter alia:

"That on or about the 24th day of October, A. D. 1930, his (defendant's) attorneys were served with a notice and affidavit to place this case on the trial calendar in compliance with Section 2 of Rule 23, and that thereafter, on or about the 30th day of October, A. D. 1930, by his attorneys, in accordance with Section 3, of Rule 23, did cause to be filed his written objections with the minute clerk of the Judge to whom this cause was assigned, and thereby objected to an immediate trial.

"Your petitioner further shows that said objections were erroneously misplaced by said clerk without negligence on his part, which error does not appear of record.

"Your petitioner further shows that under Section 4 of Rule 23 of this court, the following is provided:

The verified petition alleges, inter alia:

"That on or about the 24th day of October, A. D. 1930, [illegible] petitioner were served with a notice and alleged to place this case on the trial calendar in compliance with Section 3 of Rule 42, and that thereafter, on or about the 10th day of October, A. D. 1930, by his attorneys, in accordance with Section 3, of Rule 42, did cause to be filed his written objections with the minute clerk of the Judge to whom this cause was assigned, and thereby objected to an immediate trial.

"Your petitioner further shows that said objections were erroneously misplaced by said clerk without notification on his part, which error does not appear of record.

"Your petitioner further shows that under Section 4 of Rule 42 of this court, the following is provided:

The plaintiff, Olaf Nelson, brought an action for [illegible] on May 1, 1931, an [illegible] trial resulted in a verdict in favor of the plaintiff for $3,000 and judgment immediately followed. By its answer to a special interrogatory the jury found that the defendant was guilty of wilful and wanton conduct. On July 21, 1931, the defendant filed a petition in the nature of a writ of error [illegible] that the judgment under be vacated and set aside. The plaintiff filed a demurrer to the petition, which was overruled, and the plaintiff electing to stand by its demurrer the judgment of May 1, 1931, was set aside and vacated. Upon this last order the plaintiff has appealed.

"'Sec. 4, Rule 23. For the purpose of providing for a hearing of any objection the minute clerk of the Judge under the direction of the Judge shall from time to time make up a list of causes so noticed for trial to which objections have been filed, to be known as the Trial Notice List. There shall be a call of such list by the Judge at such convenient time as he may determine, after at least one day's notice by publication in the Daily Law Bulletin. Upon the call of such list, it shall be the duty of the objecting party to appear and support his objection. Causes noticed for trial where no objection has been filed or objections have been disallowed will be placed upon the trial calendar.'

"Your petitioner further shows that no notice appeared in the Daily Law Bulletin, as provided in said rule, that a hearing was to be had on the objection filed herein as aforesaid; that neither he nor his attorneys had any knowledge that said cause was set for trial on the 1st day of May, A. D. 1931.

"Your petitioner further shows that he had no knowledge of the entry of said judgment until a very recent date and efforts of settlement having failed, he is now presenting this petition.

"Your petitioner, therefore, prays that an order be entered vacating the judgment heretofore entered on the 1st day of May, A. D. 1931, and that he be given an opportunity to defend said cause; and that said cause be set for trial on a date to be determined by the court."

The plaintiff contends that the petition did not set up a meritorious defense and that it was therefore fatally defective. This contention is without merit. It is not necessary for the petitioner, in a proceeding like the instant one, to allege that he had a meritorious defense to the original action, as the question of the merits of the original action is not involved in such proceeding. (See Reid v. Chicago Rys. Co., 231 Ill. App. 58, 81; Chapman v. North Am. Life Ins. Co., 292 Ill. 179, 188.) "The pleadings are original, the issues are distinct from the principal suit." (Jacobson v. Ashkinaze, 337 Ill. 141, 147. See also Wozbut v. Juris, App. Ct. Gen. No. 35528, opinion filed this day.)

The plaintiff further contends that the court had no jurisdiction to vacate the judgment entered on the showing that was made. We find no merit in this contention. See Toth v. Samuel Phillipson & Co., 250 Ill. App. 247, 251-2, wherein the court said:

"Sec. 4, Rule 22. Nor the purpose of procuring
for a hearing of any objection the minute clerk of the
Judge made up the direction of the Judge shall from time to
time make up a list of causes so noticed for trial to which
objections have been filed, to be known as the Trial Notice
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such convenient time as he may determine, after at least
one day's notice by publication in the Daily Law Bulletin.
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"Your petitioner further shows that no notice appeared in the Daily Law Bulletin, as provided in said rule, that a hearing was to be had on the objection filed herein on aforesaid; that neither he nor his attorneys had any knowledge that said cause was set for trial on the 1st day of May, . . 1931.

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The plaintiff further contends that the court had no jurisdiction to vacate the judgment entered on the pleading that was made. I find no merit in this contention. See Toth v. Toth-Phillipson & Co., 330 Ill. App. 247, 251-2, wherein the court said:

"Whether the misinformation given by the clerk technically constitutes misprision we deem immaterial. The mistakes of fact upon which such a motion may be predicated are not confined to omissions or misprisions of the clerk. Here the mistake of fact was dismissing the case on the supposition that plaintiff had not appeared for trial, whereas he had, and that fact was unknown to the court when it entered the order. In principle the case is similar to that of Madden v. City of Chicago, 283 Ill. 165. It there appeared that on the general call of the calendar the case was stricken under a rule of court when plaintiff's attorneys did not appear and make known their request for trial. Such a request was made to the clerk but not correctly noted by him. After having been assured by the clerk that the request was understood plaintiff's attorneys left and were not present when the case was called. It was not only held to be such a mistake of fact as comeswithin the purview of said section, but the attorneys were warranted in assuming that the cause would be placed on the trial calendar and tried in due course by reason of the clerk's assurance. That the present case came up on the trial call and not under rules pertaining to a general call presents no valid distinction in principle between this case and that. The clerk is an officer of the court and it is his duty to note its orders that are to be subsequently spread of record. He was the proper one to consult as to the status of the case and was supposed to know and note the orders of the court, and we think plaintiff was warranted in relying upon his statement as to what they were and was not required to verify the same by consulting his minutes. The clerk, however, was mistaken and here as in the Madden case misled plaintiff and indirectly the court. We think, therefore, the case was properly reinstated." In Holbrook v. Lawton, 207 Ill. App. 497, where a number of authorities bearing upon the subject are

"whether the misinformation given by the clerk unconstitutionally con-
stituted misjudgment as does [illegible]. The existence of [illegible]
upon which such motion may be predicated are not confined to
omissions or misfeasance of the clerk. Here the misuse of fact
was diametrically the case on the supposition that plaintiff had not
appeared for trial, whereas he had, and that fact was unknown to
the court when it entered the order. In principle the case is
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been assured by the clerk that the request was understood plaintiff's
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was not only held to be such a mistake of fact as comes within the
purview of said section, but the affidavits were construed in reaching
that the cause would be placed on the trial calendar and tried in due
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was and was not required to verify the same by consulting his
minutes. The clerk, however, was mistaken and here as in the Madden
case was properly reinstated." In Holbrook v. Lawson, 307 Ill.
App. 432, where a number of authorities pertaining upon the subject are

cited, the court said: "A judge, as well as an attorney, may be misled by the fault of a clerk. * * * The tendency of the law in this State is to allow the motion under section 89 whenever it is obvious that the action of the court is based upon the fault (either of omission or of commission) of the clerk of the court. As said in Brady v. Washington Ins. Co., 82 Ill. App. 389: 'A default of the clerk is one of the recognized grounds for a writ of error coram nobis.' Tidd's Practice, sec. 1137; Silverman v. Childs, 107 Ill. App. 522. In the latter case the court said: 'The ignorance of the court as to the facts arose from the neglect of the clerk to strike the case off the regular calendar when he placed it upon the short cause calendar. Such negligence of the clerk is sufficient ground for a writ of coram nobis, and authorized the court to pass upon the motion to set aside the judgment at a subsequent term.'" (See also Butterick Publishing Co. v. Goldfarb, 242 Ill. App. 228; Lewis v. Heywood-Wakefield Co., 254 Ill. App. 606, Abst.) In Warner v. Wende, 214 Ill. App. 431, the defendant filed a special appearance to an attachment proceeding, setting out that it was for the sole purpose of moving to quash the writ and release the levy on stated grounds which, if true, rendered the attachment void. The defendant paid the appearance fee and the motion was entered and continued. There was no entry made on the court's docket and the papers given to the clerk for filing were not placed in and did not appear in the files. A judgment was then entered by default against the defendant in the attachment proceedings. At a subsequent term, on a motion, the court vacated the judgment under section 89 of the Practice act. In the opinion filed in that case the court said: "It was said in People v. Noonan, 276 Ill. 430, that a motion under such section must set up and rely on such fact or facts as are unknown to the court and do not appear upon the face of the record, and which, if known, would have precluded the rendition

of the judgment. All these elements are present in the case at bar. Had the court known of the pendency of a motion based on grounds that would have defeated the attachment, it unquestionably would not have entered a default, at least without disposing of the motion. But it acted in ignorance of such motion, knowledge of the pendency of which was prevented through misprision of the clerk in not preserving in the files the papers so left and making the proper entries on the docket. * * * We think the case comes within the purview of section 39 of the Practice Act, and that the court's action was proper."

A demurrer to a petition in the nature of a writ of error coram nobis admits all the facts well pleaded alleged as error in the petition. (See Chapman v. North Am. Life Ins. Co., supra; Jacobson v. Ashkinaze, supra.) We think the negligence of the clerk, alleged in the instant petition, was a sufficient ground for a writ of error coram nobis. As the trial court stated, in disposing of the demurrer to the petition, he would not have allowed the case to proceed to trial in the absence of the defendant had he known of the fact that the latter "had filed objections to the hearing of the case on any quick calendar." The trial court further said: "There isn't anything more fundamental, in my view, than that a lawyer should be protected in the trial of a case in his absence when it should not be tried in his presence, by all the procedure and rules that the court has been following in this jurisdiction. * * * I mean, our rule says, the cause will not be heard, will not be placed on the quick trial calendar until the objections have been heard and passed upon by the court." The trial court urged the plaintiff to answer the petition instead of demurring to it, but the attorney for the plaintiff refused to file an answer and demanded a ruling upon the demurrer.

the demurrer.

the plaintiff refuses to file an answer and demanded a ruling upon answer the petition instead of demurring to it, but the objection for passed upon by the court." The trial court ordered the plaintiff to on the ground that the petition is insufficient to state a cause of action. * * * I first its order had been following in this jurisdiction. * * * I should not be tried on its pleadings, by all the precedents and rules case, nor this one, the cause will not be heard, will not be placed on the trial docket, or if heard, will not be finally disposed of. In every attempt to file an answer and demanded a ruling upon the plaintiff refuses to file an answer and demanded a ruling upon answer the petition instead of demurring to it, but the objection for passed upon by the court." The trial court ordered the plaintiff to on the ground that the petition is insufficient to state a cause of action. * * * I first its order had been following in this jurisdiction. * * * I should not be tried on its pleadings, by all the precedents and rules case, nor this one, the cause will not be heard, will not be placed on the trial docket, or if heard, will not be finally disposed of. In every attempt to file an answer and demanded a ruling upon

The plaintiff contends that the petition shows that the attorney of the defendant was negligent and that a motion under section 89 of the Practice act is not intended to relieve a party from the consequences of his attorney's negligence. We find no merit in this contention. The defendant had a right to assume that the court would follow its own rules.

The judgment order of August 29, 1931, is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

The plaintiff contends that the petition states that a motion for attorney's fees was filed on behalf of the defendant in the original action. The plaintiff contends that the petition states that a motion was filed on behalf of the defendant in the original action. The attorney's affidavit in support of the motion for attorney's fees is not included in the petition. The attorney's affidavit in support of the motion for attorney's fees is not included in the petition. The attorney's affidavit in support of the motion for attorney's fees is not included in the petition.

The judgment entry of August 18, 1933, is attached.

ARGUMENT.

Defendant's 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th.

35640

1207

ELKAN BERGER,
Defendant in Error,

v.

LINUS EWALD RODER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

266 I.A. 615

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

By this writ of error the plaintiff in error seeks to reverse a judgment against him for $3,338 in favor of the defendant in error.

The defendant in error, on March 7, 1928, obtained a judgment by confession on a note dated December 4, 1922. Thereafter the defendant was allowed to appear and defend and there was a trial before the court, with a jury, and a verdict returned for the plaintiff for $3,338 and a judgment entered confirming the judgment by confession. From that judgment the plaintiff in error prayed an appeal to this court and thereafter we reversed the judgment of the Municipal court and remanded the cause. (See Berger v. Roder, 259 Ill. App. 629, Abst.) It is quite clear from the opinion filed that we had pronounced views as to the merits of the cause. After the remandment there was a trial by the court, without a jury, and there was a finding that there was due from the plaintiff in error to defendant in error the sum of $3,338 and there was a judgment entered confirming the judgment by confession entered March 7, 1928. This writ of error followed.

The plaintiff in error has assigned and argued a number of errors, but in the view that we take of this appeal it will be necessary to pass on one only.

33580

CLERK'S RECEIPT.

Defendant in Error.

v.

Plaintiff in Error.

RECEIPT TO MUNICIPAL COURT
OF APPEALS.

2661 A. 613

MR. JUSTICE EDWARDS DELIVERED THE OPINION OF THE COURT.

By this writ of error the plaintiff in error seeks to reverse a judgment against him for $2,338 in favor of the defendant in error.

The defendant in error, on March 7, 1938, obtained a judgment by confession on a note dated December 4, 1937. Thereafter the defendant was allowed to reopen and defend and there was a trial before the court, with a jury, and a verdict returned for the plaintiff for $2,338 and a judgment entered confirming the judgment by confession. From that judgment the plaintiff in error prayed to this court and thereafter so reversed the judgment of the municipal court and remanded the cause. (See Barnes v. Taylor, 102 Ill. App. 630, abd.) It is quite clear from the opinion filed that we had pronounced views as to the merits of the cause. That the reopening there was a trial by the court, without a jury, and there was a finding that there was due from the plaintiff in error to defendant in error the sum of $2,338 and there was a judgment entered confirming the judgment by confession entered March 7, 1938. This writ of error followed.

The plaintiff in error has assigned and argued 4 numerously to bows on one only.

of errors, but in the view that we take of this appeal it will be

The plaintiff in error contends that the finding and judgment are against the manifest weight of the evidence. After a very careful examination of the evidence we have reached the conclusion that this contention is a meritorious one. In our judgment it would be a serious miscarriage of justice to permit the instant judgment to stand. As the defendant in error may see fit to have this case tried again, we refrain from analyzing and commenting upon the facts and circumstances in evidence.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

The plaintiff in error contends that the trial and judgment are against the manifest weight of the evidence. After a very careful examination of the evidence we have reached the conclusion that this contention is well taken. In our judgment it would be a serious miscarriage of justice to permit the instant judgment to stand. In the statement to which may be fit to have this case tried again, we refrain from analyzing and commenting upon the facts and circumstances in evidence.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Zeiner, J., concur.

121 A

35661

FREDERICK A. WILSON,
Appellant,

v.

HENRY B. KILGOUR,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

266 I.A. 615[3]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit. At the conclusion of all the evidence the trial court, upon motion of the defendant, directed the jury to find a verdict for the defendant. Judgment was entered upon the verdict and the plaintiff has appealed.

Plaintiff is a real estate broker and sued to recover commission alleged to be due him from the defendant on account of the sale of certain real estate.

The plaintiff contends that there was evidence legally tending to prove the cause of action alleged in the declaration and that the trial court erred, therefore, in directing a verdict for the defendant. After a careful examination of the evidence we are satisfied that this contention is a meritorious one. A trial court has no power, when a jury is not waived, to determine the weight and preponderance of conflicting evidence introduced to establish or disprove facts nor to take a case from the jury and direct a verdict where there is legitimate evidence tending to prove the cause of action, as such procedure is a direct violation of the constitutional right of trial by jury. (Mirich v. Forschner Contracting Co., 312 Ill. 343.) In the instant case it is apparent from the language of the trial court in determining the motion that he passed upon the weight and preponderance of the conflicting evidence. The trial court said: "You see, it is the duty of the

1944

v.

Appellee.

Appellant.

CIVIL ACTION.

ANSWER AND COUNTERCLAIM.

This is an action in assumpsit. It is the contention of all the evidence the trial court, upon motion of the defendant, directed the jury to find a verdict for the defendant. Judgment was entered upon the verdict and the plaintiff has appealed.

Plaintiff is a retail coke broker and sued to recover commissions alleged to be due him from the defendant on account of the sale of certain coal refuse.

The plaintiff contends that there was evidence legally tending to prove the cause of action alleged in the declaration and that the trial court erred, therefore, in directing a verdict for the defendant. After a careful examination of the evidence we are satisfied that this contention is a meritorious one. A trial court has no power, when a jury is not waived, to determine the weight and preponderance of conflicting evidence introduced to establish or disprove facts out to take a case from the jury and direct a verdict where there is legitimate evidence tending to prove the cause of action, as such procedure is a direct violation of the constitutional right of trial by jury. (Kitton v. Pittsburgh Contracting Co., 232 Pa. 163.) In the instant case it is apparent from the language of the trial court in directing the action that he passed upon the weight and preponderance of the conflicting evidence. The trial court said: "You see, it is the duty of the

plaintiff to make out a case by a preponderance or greater weight of the evidence. He hasn't done that. * * * I don't care about the circumstances. You walk into a man's home and talk about it, and a policeman at the corner saw him come there and saw him come out. Then he makes a statement he told me to do thus and so, and the other man denies it. Are you going to let a verdict like that stand? * * * That man should be made to prove his case by a preponderance or greater weight of the evidence. They ought to get something in writing; the naked evidence of one man against another in this court isn't sufficient. I am not going to let that testimony stand. He hasn't a witness but this man himself. He tells a story that fits his own case. He may be telling the truth, I don't know; the other man may be telling the truth. The burden is on the plaintiff to make out his case by a preponderance of the evidence. Has he done it? No. I will direct a verdict here and now; and you can take it up." That there is evidence in the record legally tending to prove the plaintiff's cause of action cannot, in our judgment, be seriously questioned.

The defendant, at the close of the plaintiff's evidence, moved the court to instruct the jury to find the issues for the defendant, and now assigns as cross-error the alleged refusal of the trial court to grant this motion. It appears from the record that when the defendant tendered this motion the trial court suggested that he renew his motion at the close of all the testimony and the latter seems to have acquiesced in the procedure suggested by the court, and apparently the court did not directly pass upon the motion. In any event, the defendant did not stand by his motion, and introduced evidence in his defense. While we are satisfied that the plaintiff made out a prima facie case in his proof, still, even if he did not, under the state of the record he has a right to have

plaintiff to make out a case by a preponderance or greater weight of the evidence. He hasn't done that. * * * I don't care about the circumstances. You walk into a man's home and talk about it, and a policeman at the corner can him come there and ram him out. Then he makes a statement he told me to do this and so, and the other man denies it. Are you going to let a verdict like that stand? * * * That man should be made to prove his case by a preponderance or greater weight of the evidence. They ought to get something in writing; the verbal evidence of one man against another in this court isn't sufficient. I am not going to let that testimony stand. He hasn't a witness but this man himself. He tells a story that like his own once. He may be telling the truth, I don't know; the other man may be telling the truth. The burden is on the plaintiff to make out his case by a preponderance of the evidence. Has he done it? No. I will direct a verdict here and here and you can take it up." That there is evidence in the record logically tending to prove the plaintiff's cause of action cannot, in our judgment, be seriously questioned.

The defendant, as the close of the plaintiff's evidence, moved the court to instruct the jury to find the issues for the defendant, and now assigns as error the failure thereof. The trial court to grant this motion. It appears from the record that when the defendant renewed this motion the trial court suggested that he renew his motion at the close of all the testimony and the latter seems to have acquiesced in the procedure indicated by the court, and apparently the court did not directly pass upon the motion. In any event, the defendant did not stand by its motion, and inasmuch as the plaintiff made out a prima facie case in its proof, still, even if he did not, under the rules of the record he has a right to have the plaintiff to make out a case by a preponderance or greater weight of the evidence, or in other words, be entitled to a verdict.

the question as to whether or not he made out a *prima facie* case determined from the entire evidence.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

the question as to whether or not he knew was a Crime Index area determined from the entire evidence.

The judgment of the circuit court of Cook county is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Upshaw, P. J., and Scanlan, J., concur.

35702

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ARMANDO E. BENEDETTI,
Plaintiff in Error.

122 A

ERROR TO MUNICIPAL COURT OF CHICAGO.

266 I.A. 615

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People filed an information charging the defendant, Armando E. Benedetti, with a violation of "Par. 2A. of an Act to amend sections 4 and 5 and to add sections 2A and 4A to 'An Act revising the laws to Deadly Weapons, passed June 29th 1931 and effective July 1st 1931." A motion by the defendant to quash the information was overruled and a plea of not guilty was then entered, a jury was waived and the cause was submitted to the court, and after a hearing the defendant was found guilty. Motions for a new trial and in arrest of judgment were overruled and the defendant was sentenced to sixty days in the house of correction and fined $25 and costs. This writ of error followed.

The information charges that the defendant, on September 13, 1931, "did then and there have in his possession a certain firearm, towit; a certain Smith and Wesson Special .38 Caliber revolver, on which said revolver the manufacturers numbers had been removed and obliterated Viol Par. 2A. of an Act to amend sections 4 and 5 and to add sections 2A and 4A to 'An Act revising the laws to Deadly Weapons, passed June 29th 1931 and effective July 1st 1931 contrary to the form of the Statute," etc. "Par. 2A" (Criminal Code, Cahill's Ill. Rev. St., 1931, p. 1012, ch. 38, par. 141 (2½), sec. 2-A) reads as follows: "No person shall change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on

38202

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error.

vs.

ALFONSO X. ZERENCETTI,

Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

2566 I.A. 019

EX. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People filed an information charging the defendant, Alfonso X. Zerencetti, with a violation of "Par. 2A, ch. 38 of the Revised Statutes 1931, entitled 'An Act to revise the laws to Deadly Weapons, passed June 27th 1921 and effective July 1st 1921.'" A motion by the defendant to quash the information was overruled and a plea of not guilty was then entered, a jury was waived and the cause was submitted to the court, and after a hearing the defendant was found guilty. Motions for a new trial and in arrest of judgment were overruled and the defendant was sentenced to sixty days in the House of Correction and fined $25 and costs. This writ of error followed.

The information charged that the defendant, on September 13, 1931, "did then and there have in his possession a certain firearm, to-wit; a certain Smith and Wesson Special .38 Caliber revolver, on which said revolver the manufacturers number had been removed and obliterated (Par. 2A. of an act to amend sections 4 and 8 and to add sections 2A and 4A to 'An Act revising the laws to Deadly Weapons, passed June 27th 1921 and effective July 1st 1921 relating to the Uniform Act." Par. 2A" (Criminal Code, Smith's Ill. Ann. St., 1931, p. 1919, ch. 38, par. 141 (2)), sec. 2-A) reads as follows: "No person shall change, alter, remove, or obliterate the name of the maker,

any firearm. Possession of any firearm upon which any such mark shall have been changed, altered, removed or obliterated, shall be prima facie evidence that the possessor has changed, altered, removed or obliterated the same."

It is necessary for us to consider only one of the points made by the defendant in support of his argument that the judgment should be reversed. The defendant contends that "the information does not charge an offense," under paragraph 2-A. This contention is clearly a meritorious one. It is the settled law of this state that when a statute creates an offense an indictment or information brought under it should contain proper and sufficient averments to show a violation of the act. The only offense defined by paragraph 2-A of the act is: "No person shall change, alter, remove or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on any firearm." Mere possession of any firearm upon which any such mark shall have been changed, altered, removed or obliterated is not made an offense under the act. Therefore, the instant information does not charge the defendant with an offense under the act and it is insufficient to support the verdict and judgment in the case.

We feel impelled to say that the instant writ of error is the result of carelessness of the assistant state's attorney who represented The People. The meaning of paragraph 2-A is very plain and a casual reading of the information would have disclosed that it did not contain proper and sufficient averments to show a violation of the law. Moreover, the defendant made a motion to quash the information and at that time it might have been amended on motion had the assistant state's attorney seen fit to read the paragraph in question and the information. It is somewhat surprising that the trial court, upon the motion to quash, and also

any literature. Possession of any literature upon which any such mark shall have been changed, altered, removed or obliterated, shall be prima facie evidence that the possessor has changed, altered, removed or obliterated the same."

It is necessary for us to consider only one of the points made by the defendant in support of his argument that the judgment should be reversed. The defendant contends that "the information does not charge an offense," under paragraph 2-A. This contention is clearly a meritorious one. It is the settled law of this state that when a statute creates an offense by indirection or information merely it should contain proper and sufficient averments to show a violation of the act. The only offense defined by paragraph 2-A of the act is: "No person shall change, alter, remove or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on any firearm." Mere possession of any firearm upon which any such mark has been changed, altered, removed or obliterated is not made an offense under the act. Therefore, the instant information does not charge the defendant with an offense under the act and it is insufficient to support the verdict and judgment in the case.

We feel impelled to say that the learned writ of error in the recent of counsel-case of the material state's attorney who represented The People. The wording of paragraph 2-A is very plain and a casual reading of the information would have disclosed that it did not contain proper and sufficient averments to show a violation of the law. However, the defendant made a motion to quash the information and at that time it might have been amended on motion and the material state's attorney then filed the instant information. It is somewhat surprising that the trial court, upon the motion to quash, and also

upon the motions for a new trial and in arrest of judgment, did not observe the obvious insufficiency of the information.

The judgment of the Municipal court of Chicago is reversed, and as the information may be amended, upon motion, the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

upon the motions for a new trial and in arrest of judgment, did not observe the obvious invalidity of the information.

The judgment of the municipal court of Denver is reversed, and as the information may be amended, upon remand, the cause is remanded.

REVERSED AND REMANDED.

Oriahey, J., and Sawyer, J., concur.

35858

1237

CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Trustee, (Complainant) Appellee,

v.

HARRY RAM et al., Defendants.

MAX AGRANOWSKY and SOPHIE AGRANOWSKY, (Defendants) Appellants.

INTERLOCUTORY

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

266 I.A. 616

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Max Agranowsky and Sophie Agranowsky, the owners of the equitable title to the premises in question, have filed an appeal from an interlocutory order appointing a receiver in a foreclosure proceeding.

The complainant filed a motion in this court to dismiss the appeal on the ground that this court was without jurisdiction to entertain the instant appeal because the appellants failed to comply with the statutory requirements. The point made was that two defendants had appealed and only one, Max Agranowsky, signed the bond to secure costs in the Appellate court. The motion was denied. Had the appellee moved to dismiss the appeal as to Sophie Agranowsky we probably would have sustained it. However, the dismissal of the appeal as to Sophie Agranowsky would have availed the appellee nothing.

After the complainant filed its verified bill it made a motion for the appointment of a receiver. On December 10, 1931, the appellants filed their answer, and on December 24, 1931, the chancellor entered the order appointing a receiver. The order

CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Trustee,
(Complainant) Appellee,

v.

MARY IVAN et al.,
Defendants.

MAX ADRIANOVSKY and SOPHIE
ADRIANOVSKY,
(Defendants) Appellants.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Max Adrianovsky and Sophie Adrianovsky, the owners of the equitable title to the premises in question, have filed an appeal from an interlocutory order appointing a receiver in a foreclosure proceeding.

The complainant filed a motion in this court to dismiss the appeal on the ground that this court was without jurisdiction to entertain the instant appeal because the appellants failed to comply with the statutory requirements. The point made was that two defendants had appealed and only one, Max Adrianovsky, signed the bond to secure costs in the Appellate Court. The motion was denied. And the appellee moved to dismiss the appeal as to Sophie Adrianovsky on the ground that she had not joined in it. However, the dismissal of the appeal as to Sophie Adrianovsky could have availed the appellee nothing.

After the complainant filed its motion all it made a motion for the appointment of a receiver. On December 10, 1931, the appellants filed their answer, and on December 24, 1931, the chancellor entered the order appointing a receiver. This order

25828 A. 616
CLERK'S OFFICE.
APPEAL FROM SUPERIOR COURT,
IMPOUNDED

appointing the receiver recites:

"And it appearing to the court that the said Trust Deed sought to be foreclosed herein by said bill of complaint provides for the appointment of a Receiver, without notice; that the trust deed is a first encumbrance upon the said premises, and that a default has been made in the payment of said indebtedness secured by the trust deed herein sought to be foreclosed.

"And it appearing to the court that Sophie and Max Agranowsky are the owners of the equity of redemption of said premises and have been served with notice of this motion.

"Whereupon, for good cause shown, and after a full and complete hearing, and after arguments of counsel and the court being fully advised in the premises, the court is of the opinion that a receiver ought to be appointed.

"It is Therefore Ordered, Adjudged and Decreed that Chicago Bank of Commerce, a corporation, be and it is hereby appointed Receiver to take charge of the real estate and the premises hereinabove and in the bill of complaint described," etc.

The complainant, Chicago Title and Trust Company filed its bill to foreclose in compliance with a written demand made by Nathan Bernstein, the alleged owner of a bond in the sum of $1,000, which became due July 25, 1931. The bill alleges that the trust deed in question was given to secure the payment of 44 bonds, dated July 25, 1928, in denominations and maturities as follows:

"Numbers of Bonds	Denominations of Bonds	Term of Years	Date of Maturity
1	$1,000.00	3 years	July 25, 1931
2	1,000.00	4 "	July 25, 1932
3-10 inclusive	1,000.00	5 "	July 25, 1933
11-44 inclusive	500.00	5 "	July 25, 1933"

The bill also alleges that the trust deed pledges the rents, issues and profits of the premises and stipulates for the appointment of a receiver without notice and without regard to the solvency or insolvency of the persons primarily liable for the principal indebtedness, contains the usual provisions in reference to taxes, assessments, etc., and provides that the makers agree to keep said premises in good condition and repair and not to suffer or permit said premises, or any part thereof, to be sold or forfeited for any tax, special assessment or other governmental charge whatsoever; that in case "(1) default

"Numbers of Bonds	Denominations	Term of Years	Date of Maturity
1	$1,000.00	3 years	July 15, 1927
2	1,000.00	4 "	July 15, 1928
3-10 inclusive	1,000.00	5 "	July 15, 1929
11-44 inclusive	500.00	8 "	July 15, 1932"

The bill also alleges that the trust deed pledges the common, issued partly of the proceeds and withheld from the authority of the Attorney-Generalship without notice and without regard to the validity or invalidity of a receiver without notice and without regard to the validity or invalidity of a part thereof, to be sold or hypothecated for the purposes of a other Government obligations; that in case "(I) default

day in question was given to assume the payments of 44 bonds, cross which became due July 15, 1931. The bill alleges that the trust Eastman Corporation, the alleged owner of a home in the sum of $1,000, the bill is forclosed in conformance with a written demand made by

The complainant, Citizens Title and Trust Company filed

pledged Bonds is duly complied with and the said trust estate and the aforesaid Provident Savings Bank of Commerce, a corporation, be and it is hereby

"It is Therefore Ordered, Adjudged and Decreed that

that a decree ought to be rendered;

being duly waived in the premises, the court is of the opinion

complete pending, and after statements of counsel and the court

"December, 1st then came again, and after a full and

Receiver was duly appointed with notice at this meeting.

Thereupon the court took the matter under advisement and

"And it appearing to the court that the said Trust Deed

by the trust deed hereto sought to be foreclosed.

"And it appearing to the court that the said Trust Deed

default has been made in the payment of said interest coupons

due in a first mortgage upon the said premises, and that a

for the appointment of a Receiver, without notice; that the trust

exists to be foreclosed herein by said bill of complaint praying

and providing that the makers agree to keep said premises in good con-

tains the usual provisions in reference to taxes, assessments, etc.,

of the premises pledged therein, and waiving all benefits of

receiver without notice and without regard to the validity or invalidity

and benefits of the premises and authorizing the appointment of a

shall be made in the due and punctual payment of any principal on any of said bonds at the time and place therein specified; (2) default shall be made in the due and punctual payment of any interest on any bond thereby secured and outstanding; and any such default in payment of principal or interest shall continue for a period of twenty (20) days, then the whole of said principal sum secured thereby, together with the interest accrued thereon, shall at once, without notice, at the option of the holder of any one of said bonds then unpaid, become due and payable." The bill further alleges that Bond No. 1, in the principal sum of $1,000, due July 25, 1931, was not paid by the makers nor anyone on their behalf, and that such default having continued for more than twenty days, Nathan Bernstein, the owner of the bond, has elected to declare, and has declared, the whole of the principal sum evidenced by bonds numbered 1 to 44, both inclusive, aggregating $27,000, together with the interest thereon, due and payable, and the makers thereof, or anyone on their behalf, having failed to pay the same, the same are in default under the terms of the trust deed; that the trust deed "is a first, valid and subsisting lien against the premises aforesaid; that it is a construction mortgage and is superior to all other liens whatsoever." The bill further alleges that the principal sum of $27,000 due on the bonds, being in default for more than twenty days "and written demand having been made upon your Orator to institute foreclosure proceedings, this bill is filed herewith for the foreclosure of the lien of said trust deed and the sale of said premises." The bill further alleges that the general taxes for the year 1929 in the amount of $214.01 have not been paid and the premises have been forfeited because of such failure; that "by mesne conveyances title to said premises is now vested in Sophie Agranowsky" and that on October 8, 1928, she and Max Agranowsky, her husband, executed and delivered

apply be made in the due and punctual payment of any principal
or any of said bonds at the time and place therein specified; (3)
default shall be made in the due and punctual payment of any interest
on any bond thereby secured and collateralized when any such default in
payment of principal or interest shall continue for a period of
twenty (20) days, then the whole of said principal sum secured there-
by, together with the interest accrued thereon, shall at once, without
notice, at the option of the holder of any one of said bonds then
owned, become due and payable." The bill further alleges that
bond No. 7, in the principal sum of $1,000, due July 1, 1937, was
not paid by the maker nor anyone on their behalf, and that such de-
fault having continued for more than twenty days, further default,
the owner of the bond, then elected to declare, and has declared, the
whole of the principal sum evidenced by notes numbered 1 to 24, both
inclusive, aggregating $24,000, together with the interest thereon,
due and payable, and the makers thereof, or anyone on their behalf,
having failed to pay the same, the same is in default under the
terms of the trust deed that the trust deed "is a first, valid and
subsisting lien against the premises described; that it is a con-
struction mortgage and is superior to all other liens whatsoever."
The bill further alleges that the principal sum of $24,000 and the
bonds, being in default for more than twenty days "and written demand
having been made upon Grantor to substitute foreclosure proceed-
ings, this bill is filed herewith for the foreclosure of the lien
of said trust deed and the sale of said premises." The bill further
alleges that the general taxes for the year 1936 in the amount of
$1164.01 have not been paid and the premises have been forfeited be-
cause of such failure; that "by usual conveyances title to said
premises is now vested in Ophie Kronowski" and that on October 8,
1936, the said Kronowski, her husband, executed and delivered

their 36 principal promissory notes, aggregating $6,800, and to secure the payment of the same they conveyed the premises in question to Fred F. Block by their trust deed of that date, which was duly acknowledged and recorded; that on November 8, 1923, Sophie Agranowsky and Max Agranowsky, her husband, executed and delivered their principal promissory note in the sum of $500, payable 50 weeks after date thereof, and to secure the payment of the same they, by their trust deed of that date, conveyed the premises in question to Marks Miller, which said trust deed was duly acknowledged and recorded; that on April 13, 1929, Line Fine and Julius Fine, her husband, and Sophie Agranowsky and Max Agranowsky, her husband, executed and delivered their one principal promissory installment note in the sum of $3,000, and to secure the same Line Fine and Julius Fine, her husband, and Sophie Agranowsky and Max Agranowsky, her husband, by their trust deed of that date, conveyed the premises in question to Samuel H. Rosenthal, which said trust deed was duly acknowledged and recorded; that on March 24, 1930, the said Sophie Agranowsky and Max Agranowsky, her husband, executed and delivered their principal promissory installment note in the sum of $1,000, and to secure the same the said Sophie Agranowsky and Max Agranowsky, her husband, by their trust deed of that date conveyed the premises in question to Marks Miller, which said trust deed was duly acknowledged and recorded. The bill further alleges, upon information and belief, that the premises in question contain six apartments, some of which are vacant; that the owners of the equity have neglected the premises and the building thereon has been allowed to deteriorate and is in great need of repairs and attention; that the owner of the equity of redemption has used the income she has derived from the apartments in said building and applied the same on junior incumbrances; that

the fair and reasonable market value of the premises is $26,000 and that unless a receiver is appointed the owners of the principal indebtedness under the senior mortgage will lose a large part of the same.

The substance of the material parts of the answer of the defendants is as follows: That at the maturity of bond No. 1 for $1,000, owned by Nathan Bernstein, the defendants informed the said Bernstein that they were unable to meet the payment of the said bond "due to the fact that they had lost the sum of $792 under a savings account in a bank which had closed and which went into receivership, and that by reason thereof, they were compelled to borrow the sum of $1,000 to pay the interest that was due on the entire issue * * *, that at said time the said Nathan Bernstein had agreed with these defendants that he would extend the payment of the said $1,000 until these defendants would pay the money that they borrowed for the purpose of paying the interest, at which time the $1,000 shall be payable in weekly installments;" that they owe a balance of $113 on the $1,000 borrowed and "will be able to make payments on the $1,000 bond as soon as the $113 is paid on the loan made; * * * deny that default has been made in the payment of the general taxes for the year 1929 but state the fact to be that the general taxes for the year 1929 aggregated the sum of $601.42, and that on the 14th day of May, 1931, these defendants have paid the sum of $400 leaving a balance of $201.42, that the said bill was given for the purpose of being protested, and that inadvertently the one to whom the same was given for protest did not file objections to the same; deny that there is due the sum of $6,800 under a mortgage which is junior and superior to the mortgage herein foreclosed, and state the fact to be that there is due but the sum of $2,000 on said indebtedness, and that the holder thereof, had agreed to extend the

indebtedness under the senior mortgage will lose a large part of the same.

The explanation of the remaining part of the amount of the defendants is as follows: Part of the monthly payment of $30, i for $1,000, owned by Hudson Realestate, the defendants informed the said Bernstein that they were unable to meet the payment of the said bond due to the fact that they had lost the sum of $788 under a savings account in a bank which had closed and which went into receivership, and that by reason thereof, they were compelled to borrow the sum of $1,000 to pay the interest that was due on the entire issue " " that at said time the said Hudson Realestate had advised with their defendants that he would extend the payment of the said $1,000 until three defendants would pay the money that they borrowed for the purpose of paying the interest, at which time the $1,000 would be payable in monthly instalments; that they were behind of $113 on the $1,000 payment and "will be able to make payments on the $1,000 paid by each as the $113 is paid on the loan made; " " " that default has been made in the payment of the monthly rates for the year 1929 and state the fact to be that the said $1,000 extended the sum of $1,000.00, and that on the 14th day of May, 1931, these defendants have paid the sum of $600 leaving a balance of $400.00, that the said bill was given for the purpose of being protected, and that inadvertently the one to whom the note was given for protest did not file objections to the same; only that there is due the sum of $1,000 under a mortgage which is junior and subsequent to the mortgage herein foreclosed, and that unless a receiver is appointed the amount of the present indebtedness under the senior mortgage will lose a large part of the same.

payments of any moneys due under said second mortgage until all defaults were cured under the trust deed herein sued upon; * * * deny that there is due the sum of $500 in a mortgage to Marke Miller, but state the fact to be that there is due but $100 thereon; * * * deny that they have borrowed the sum of $3,000 under a junior mortgage but state the fact to be that they have guaranteed payments of a note for one Julius Fine and Line Fine and that they have received no part or portion of said indebtedness. These defendants further answering state that all interest which matured on July 25th, 1931, under said bond issue had been fully paid to all the bondholders, and that no default exists under any other provision of the said trust deed; * * * admit that the said trust deed sued upon is a first, valid lien upon said premises; * * * admit that the said premises are located at 1643 No. Spaulding Avenue, Chicago, Ill. and consist of six apartments, but deny that any of said apartments in said building are vacant; * * * deny that they have neglected the said premises and that the said building has been allowed to deteriorate in value, and deny that the said building is in need of repairs and attention; * * * deny that they have taken the income derived from the apartments in said building and have paid other indebtedness; * * * deny that the general taxes for the year 1929 have been forfeited and were not paid, and deny that the fair, reasonable, market value of said premises is $26,000 and further deny that a receiver ought to be appointed hereof; * * * further answering state the fact to be that the said premises cost these defendants the sum of $44,000, that they have a cash equity in the said premises of $15,000 and that the said premises in their present condition and state are conservatively worth $33,000 to $35,000; * * * further answering state that no flat or apartment in said premises is

vacant, and all cleaning and decorating that was necessary to be done had been done, that these defendants have installed mechanical refrigerators at their own cost and that the said premises have not deteriorated in value and that no waste of any kind, nature or description has been committed to said premises."

In support of their argument that the receiver was improvidently appointed the appellants cite the late case of Frank v. Siegel, 263 Ill. App. 316, wherein it was held that even though the trust deed conveys the rents and profits as security and provides that a receiver of the premises may be appointed upon default in the payment of any of the indebtedness, a receiver should not be appointed solely upon the allegations of a bill that there is such a default and a general allegation that the security is scant; that the burden is upon the applicant for a receiver to present facts by verified bill, petition, or by evidence showing the necessity for such an appointment; that a receiver will not be appointed unless equitable considerations so require. Further consideration of that important case has strengthened our belief that the rule therein announced is an equitable, wholesome and necessary one, and should be strictly enforced. The appellants contend that the allegations in the bill upon information and belief are not competent evidence in support of the motion for the appointment of a receiver. This contention is a meritorious one. (See Sherman Park State Bank v. Loop Office Bldg. Corp., 238 Ill. App. 450, 451; Grabowski v. MacLaskey, 257 Ill. App. 484, 487.) In answering the instant contention of the appellants the appellee cites the well established rule that where the allegations of a bill are informal or insufficient, objections should be taken by demurrer in the court below, so that the complainant may have an opportunity to amend, and that where a defendant, instead of demurring, joins issue on a bill that

vacant, and all pleading and documentation that was necessary to be done had been done, that those defendants have instead wrongfully deprived in value and that no waste of any kind, waste or destruction has been committed to said premises."

In support of their argument that the receiver was improvidently appointed the appellants cite the case of Kemp v. Kemp, 169 Ill. App. 316, wherein it was held that upon the payment of any of the indebtedness, a receiver should not be appointed solely upon the allegations of a bill that there is another remedy and a general allegation that the security is about to be lost; that the burden is upon the applicant for a receiver to present facts by verified bill, petition, or affidavits showing the necessity for such an appointment; that a receiver will not be appointed unless there is strictly enforced. The appellants contend that the allegations in the bill upon information and belief are not competent evidence in support of the motion for the appointment of a receiver. This contention is a meritorious one. (See Chicago Park Dist. v. Lake Shore Office Bldg. Corp., 330 Ill. App. 650, 657; Northcott v. Northcott, 324 Ill. App. 194, 204.) In enumerating the instances

is informal or insufficient and goes to trial on the issue, he cannot be heard for the first time in this court to question the insufficiency or the informality of the allegations of the bill. This rule has no application to the instant contention. The appellants are not here questioning the sufficiency of the allegations of the bill. Their contention is that upon the hearing of a motion for the appointment of a receiver the allegations in a bill upon information and belief have no evidentiary value.

It appears from the order that the chancellor did not hear any evidence upon the motion to appoint the receiver. The allegations that several apartments are vacant, that the owners of the equity of redemption have neglected the premises and have allowed the building to deteriorate, that the income of the building is used to pay junior incumbrances and that the fair and reasonable value of the building is $26,000, and that "unless a receiver is appointed * * * the owners of the bonds secured by the trust deed sought to be foreclosed herein will lose a large part of said indebtedness," are all alleged on information and belief, and therefore could have no evidentiary value in support of the motion. Furthermore, all of these allegations were denied in the answer. To support an order appointing a receiver the chancellor should make findings of fact sufficient to justify the appointment. In the instant case the chancellor has failed to make such findings; in fact, he could not do so, under the state of the pleadings, when he passed upon the motion. From the order itself it appears that the chancellor made the appointment upon the ground that the bill "provides for the appointment of a receiver, without notice; that the trust deed is a first encumbrance upon the said premises, and that a default has been made in the payment of said indebtedness secured by the trust deed

herein sought to be foreclosed." Under the ruling in Frank v. Siegel, supra, this is not a sufficient ground to justify the appointment.

In our opinion, the receiver in this cause was improvidently appointed, and the order in question is therefore reversed.

REVERSED.

Gridley, P. J., and Kerner, J., concur.

Patrick Dwight to be foreclosed." Under the ruling in Zions v.
Tiegel, supra, this is not a sufficient reason to justify the
adjournment.

In our opinion, the evidence in this case was sufficiently
explained, and the order in question is therefore reversed.

Dwight, P. J., and Kemper, J., concur.

36005

DOUGLAS PARK DAY AND NIGHT NURSERY, a Corporation,
Complainant - Appellee,

vs.

GEORGE W. DICKEY et al.,
Defendants.

MADISON & KEDZIE STATE BANK, Trustee, and CHICAGO TITLE AND TRUST COMPANY, First Successor in Trust,
Appellants.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

266 I.A. 616[2]

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is an appeal by two of the defendants who seek the reversal of an order entered by the Superior court of Cook county appointing a receiver for an apartment building. The appointment was made on the verified bill by which it was sought to have a trustee appointed on the alleged ground that there was a vacancy in the trusteeship of a trust deed given to secure a bond issue. The bill in this case is a literal copy of the bill except as to the names of the parties, the property involved, and the amount of the bond issue, which we had under consideration in the case of Belfosky v. Johnson, No. 35989, and in which we filed an opinion May 10, 1932. Both parties concede this to be the fact, but counsel for complainant strenuously contend that the decision in the Belfosky case was wrong. We have again considered the questions raised and are satisfied with the conclusion reached in the Belfosky case. It is therefore unnecessary for us here to analyze the allegations of the bill or to discuss the legal contentions made, and for the reasons stated in the Belfosky case, the order appealed from is reversed.

To the suggestion of counsel for the defendants that the order appealed from be reversed with directions to the Superior court to dismiss the bill, we say that since this contention was first made in the reply brief, we do not pass upon the question whether the bill should be dismissed, the complainant having had no opportunity to make reply.

ORDER REVERSED.

McSurely and Matchett, JJ., concur.

36009

DUNDALK PARK DAY AND NIGHT RACEWAY, a Corporation,
Complainant - Appellee,

vs.

GEORGE V. DICKEY et al.,
Defendants.

MACKUEN & EDGAR TITLE GUAR. Trustee,
and UNICORN TITLE AND TRUST COMPANY,
First Successor in Trust,
Appellants.

RECEIVED
JUN 14 1929
CLERK SUPREME COURT

Filed 1929 A. 616

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

This is an appeal by two of the defendants who seek the reversal of an order entered by the Superior Court of Cook County appointing a receiver for a apartment building. The appointment was made on the verified bill by which it was sought to have a trustee appointed on the alleged ground that there was a vacancy in the trusteeship of a trust used given to secure a bond issue. The bill in this case is a literal copy of the bill except as to the names of the parties, the property involved, and the amount of the bond issue, which was the matter considered in the case of Mallory v. Johnson, No. 18926, not in which we filed an opinion Jan 14, 1929. Both parties concede this to be the fact, but counsel for complainant strenuously contend that the decision in the Mallory case was wrong. We have again considered the questions raised and are satisfied with the conclusion reached in the Mallory case. It is therefore unnecessary for us here to analyze the allegations of the bill or to discuss the legal contentions made, such for the reasons stated in the Mallory case, the order appealed from is reversed.

To the suggestion of counsel for the defendants that the order appealed from be reversed with direction to the Superior court to dismiss the bill, we may first state this contention was first made in the reply brief, so to put pass upon the question whether the bill should be dismissed. The complainant having had no opportunity to make reply.

REVERSED.

Reversed and Remanded, 17., concur.

36006

MARY RUBINSKY,
(Complainant) Appellee,

vs.

GERTRUDE HODGSON et al.,
Defendants.

MADISON & KEDZIE STATE BANK, Trustee, and CHICAGO TITLE AND TRUST COMPANY, First Successor in Trust,
Appellants.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

266 I.A. 616[3]

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On February 27, 1932, the Superior court of Cook county on motion of the complainant appointed a receiver of certain property, the appointment was made on the verified bill, and the Madison & Kedzie State Bank, Trustee, and the Chicago Title and Trust Company, First Successor in Trust, two of the defendants, appeal from that order.

In the instant case the allegations of the bill in all substantial respects are the same as the allegations of the bills in the cases of Belfosky v. Johnson, No. 35989, and Douglas Park Day and Night Nursery, a corporation, v. Dockey, No. 36005. And substantially the same arguments are advanced in the instant case as in the other two cases, and for the reasons stated in the opinion which we filed in the Belfosky case on the 10th inst., the order appealed from is reversed.

To the suggestion by counsel for defendants, that the order appealed from be reversed with directions to the Superior court to dismiss the bill, we say that since this contention was first made in the reply brief, we do not pass upon the question of the dismissal of the bill, the complainant having had no opportunity to make reply.

ORDER REVERSED.

McSurely and Matchett, JJ., concur.

/

36008

MARY BURINGAY,
(Complainant) Appellee,

vs.

BENTRUDE HOWDOCK et al.,
Defendants.

MADISON & KEDZIE STATE BANK,
Trustee, and CHICAGO CITIZ. ASS. SURETY
COMPANY, First Successor in Trust,
Appellants.

266 I.A. 616

ABSTRACT AND BRIEF OF CASE
FILED BY APPELLEE.

MR. CHIEF JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

On February 27, 1920, the Superior court of Cook county on motion of the complainant appointed a receiver of certain property. The appointment was made on the verified bill, and the Madison & Kedzie State Bank, Trustee, and the Chicago Title and Trust Company, First Successor in Trust, two of the defendants, appeal from that order.

In the instant case the allegations of the bill in all material respects are the same as the allegations of the bills in the cases of Kolinsky v. Jackson, No. 13902, and Chicago Title and Trust Company, a corporation, v. Cheney, No. 36[illegible]. And substantially the same arguments are advanced in the instant case as in the other two cases, and for the reasons stated in the opinion which we filed in the Kolinsky case on this date, the order appealed from is reversed.

To the suggestion by counsel for defendants, that the order appealed from be reversed with directions to the Superior court to dismiss the bill, we say that since this application was first made in the reply brief, we do not care upon the question of the dismissal of the bill, the complainant having had no opportunity to make reply.

REVERSED AND REMANDED.

Reversed and remanded, with order.

35998

SAM SCHWARTZ,
Appellee,

vs.

HOWARD G. REED et al.

MADISON & KEDZIE STATE BANK, Trustee, and CHICAGO TITLE & TRUST CO., First Successor in Trust,
Appellants.

134 A

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

266 I.A. 616

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

A bill was filed in this case praying for the appointment of a trustee on the ground that there was a vacancy in the trusteeship mentioned in the trust deed, and the prayer further was that, pending the hearing, a receiver be appointed of the premises conveyed by the trust deed. A receiver was appointed and this appeal followed.

The bill filed in this case, and the order appointing a receiver, are in all substantial respects the same as the bill and order entered in the case of Belofsky v. Johnson, No. 35989, in which we filed an opinion May 10, 1932, reversing the order appointing the receiver. Subsequently, on May 26, 1932, we filed opinions in two other cases, viz: Douglas Park Day and Night Nursery v. Dickey, No. 36005, and Rubinsky v. Hodgson, No. 36008, in which we said we were entirely satisfied with the reasons advanced and the conclusion reached in the Belofsky case, and the orders appointing the receivers in these cases were reversed.

For the reasons stated in the Belofsky case, the order appointing a receiver is reversed.

ORDER REVERSED.

McSurely and Matchett, JJ., concur.

25998

SAM COUNARTS,
Appellee,

vs.

EDWARD G. REED et al.

MADISON & KEDZIE STATE BANK, Trustee, and CHICAGO TITLE & TRUST CO., First Successor in Trust,
Appellants.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

266 I.A. 616

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

A bill was filed in this case praying for the appointment of a trustee on the ground that there was a vacancy in the trusteeship mentioned in the trust deed, and the prayer further was that, pending the hearing, a receiver be appointed of the premises conveyed by the trust deed. A receiver was appointed and this appeal followed.

The bill filed in this case, and the order appointing a receiver, are in all substantial respects the same as the bill and order entered in the case of Bejcinsky v. Johnson, No. 35988, in which we filed an opinion May 10, 1932, reversing the order appointing the receiver. Subsequently, on May 25, 1932, we filed opinions in two other cases, viz: Douglas Park Day and Night Nursery v. Risser, No. 35999, and Kralovec v. Jacobson, No. 35995, in which we said we were entirely satisfied with the reasons advanced and the conclusion reached in the Bejcinsky case, and the orders appointing the receivers in those cases were reversed.

For the reasons stated in the Bejcinsky case, the order appointing a receiver is reversed.

ORDER REVERSED.

McSurely and Matchett, JJ., concur.

36031

MARY RUBINSKY,
Appellee,

vs.

GUST ZETTAS et al.

MADISON & KEDZIE STATE BANK, Trustee, and CHICAGO TITLE AND TRUST COMPANY, First Successor in Trust,
Appellant.

135 A

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

266 I.A. 617[1]

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal certain of the defendants seek to reverse an order appointing a receiver in a bill filed for the appointment of a trustee of the trust deed given to secure an indebtedness on the ground that the trusteeship had become vacant, the bill having prayed for the appointment of a receiver pending the hearing.

The bill filed in this case, and the order appointing a receiver are in all substantial respects the same as the bill and order entered in the case of Belofsky v. Johnson, No. 35989, in which we filed an opinion May 10, 1932, reversing the order appointing the receiver. Subsequently, on May 26, 1932, we filed opinions in two other cases, viz: Douglas Park Day and Night Nursery v. Dickey, No. 36005, and Rubinsky v. Hodgson, No. 36008, in which we said we were entirely satisfied with the reasons advanced and the conclusion reached in the Belofsky case, and the orders appointing the receivers in those cases were reversed. And on this day we are filing an opinion in a similar proceeding, No. 35998, entitled Schwartz v. Reed, where we reached the same result.

For the reasons stated in the Belofsky case, the order appointing a receiver is reversed.

ORDER REVERSED.

McSurely and Matchett, JJ., concur.

256 I.A. 617

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 617²

BE IT REMEMBERED, that afterwards, to-wit: On FEB 1 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8379 Ag. No. 9

In the Appellate Court of Illinois

Second District

October Term, A. D. 1931

The People of the State of
Illinois, ex rel George H.
Worth,

appellant,

vs.

City of Waukegan, Lake County,
Illinois, a municipal corporation,

appellee,

Appeal from Circuit Court of
Lake County.

BALDWIN, J:

In this cause the record discloses that one George H. Worth, the appellant herein, filed a petition for a writ of mandamus in which he sought to be re-instated to the position of water-works engineer, from which he claims to have been discharged without cause on or about January 8th, 1929.

The appellee filed a general demurrer, which upon argument was sustained. Subsequently an amended petition was filed, to which there also was filed a general demurrer, and the court overruled the demurrer. Subsequently the attention of the Court was called to an Act entitled, "An Act in Relation to Judicial Notice," approved June 21, 1929, and effective July 1, 1929.

At the time the attention of the Court was called to the Judicial Notice Act certain ordinances of the City of Waukegan were brought to the notice of the court, and after a consideration thereof, the court vacated the order overruling the demurrer to the amended petition and entered an order sustaining the demurrer. Appellant refused to plead any further and abided by his petition and it was accordingly dismissed by the court. From the action of the court in sustaining the demurrer to the amended petition,

Gen. No. 6272

In the Appellate Court of Illinois,

Second District.

October Term, A. D. 1901

The People of the State of
Illinois, ex rel Henry B.
Hoyt,

appellant,

vs.

City of Waukegan, Lake County,
Illinois, a municipal corporation,

appellee.

BALDWIN, J:

In this cause the record discloses that one Henry B. Hoyt, the appellant herein, filed a petition there with of Waukegan in which he sought to be re-instated on the register of voters-York employer, from which he claims to have been discharged without cause on or about January 7th, 1901.

The appellee filed a remark demurrer, which upon argument was sustained. Subsequently an amended petition was filed, to which there also was filed a general demurrer, and the court overruled the demurrer. Subsequently the attention of the Court was called to an Act entitled, "An Act in relation to Judicial Duties," approved June 21, 1895, and effective July 1, 1895.

At the time the attention of the Court was called to the Judicial duties Act certain ordinances of the City of Waukegan were brought to the notice of the court, and after a consideration thereof, the court sustained the other demurrer to the amended petition and ordered in order upon the demurrer. Appellant refused to plead on further and by the petition and it was accordingly dismissed by the court. From the action of the court in sustaining the demurrer to the amended petition,

appellant appealed the cause to the Supreme Court to the December Term, 1930, believing that a constitutional question was involved with reference to the Judicial Notice Act.

The Supreme Court, at the April Term, 1931, being of the opinion that the case was wrongfully appealed to that court, ordered that the same be transferred to this court, which was accordingly done, and the matter is now before us on the record, abstract and briefs filed in the Supreme Court. The record discloses that the ordinances to which the attention of the court was called were ordinances which were duly passed by the council of the City of Waukegan and as such were in full force and effect and in accordance with the Judicial Notice Act (see Smith-Hurd 1931, Chap. 51. Sec. 48 (a))the trial court was bound to notice.

Appellant in his petition sought to show that he was entitled to be restored to the position of water-works engineer from which he had been discharged without cause, as he claims, on January 8, 1929. The petition alleges that the City of Waukegan had established a Civil Service Commission and that he had been certified by the Commission to the position of water-works engineer for the city, and that for a number of years he had acted in that capacity and continued therein until the 8th day of January, 1929, when he was discharged therefrom; that commencing with the first day of February 1929, and until the filing of his petition, January 24, 1930, he sent a bill each month to the Mayor of the City for services and expressed a willingness and readiness to perform the duties of the office and he demanded of the Commission that they certify his pay up to the time of the filing of the petition, and in other respects he claims that his discharge was not in good faith and was not for the purpose of investigating his conduct and actions, etc., and that at the time of his discharge there were sufficient funds appropriated to pay his salary.

The ordinances above referred to were to the effect

that the City, by its revised ordinances of 1905, created the office of water-works engineer, provided the appointee should give bond, and the ordinance defined his duties, by an amendment to that ordinance passed April 18, 1912, his duties were more particularly described and his salary fixed. It appears that this condition continued, except as to the amount of the salary, until February, 1927, when the City of Waukegan, by appropriate ordinances, authorized the issuance of water fund certificates of indebtedness to pay for the construction and maintenance of a new water-works system and ventilation plant and in order to secure the said water fund certificates of indebtedness and for the conduct of the plant these ordinances created a Board of Trustees of said water-works system and delegated to that Board the complete charge with reference to the maintenance and operation of the water works plant and the employment and payment of such employees as it saw fit to engage.

When the new water works system was constructed and after its operations had begun the City of Waukegan, by ordinance under date of January 10, 1929, abolished certain of the water department offices then existing which included the office of water-works engineer, then held by relator Worth, claiming that the Board of Trustees created by the ordinances aforesaid having taken over the system and having appointed such employees as it deemed necessary for the proper handling of the water works, that there was no occasion for the city proper to have such officials.

The court below thus had before it the petition for mandamus and the several ordinances of the City of Waukegan, therefore, a question of law was immediately presented to the court by the demurrer filed.

It is quite apparent from the argument of the appellant that, at the time of the trial, he was of the opinion that a constitutional question was involved and he proceeded to argue that the act known as the Judicial Notice Act was unconstitutional

and after the decision of the court he appealed the cause to the Supreme Court.

The arguments of counsel on both sides in their briefs present this same question here, but as this court has no jurisdiction to consider a constitutional question, that phase of the appeal will not be considered by us.

Appellant claims that he was discharged without any charges having been preferred against him as is provided for the discharge of one who is under civil service in the employ of cities and he relies upon the case of People vs. Coffin, 282 Ill. 299 at page 610.

In the view we take of this case we are of the opinion that the rule announced in the Coffin case is not controlling here.

There was no attempt on the part of the City of Waukegan to discharge appellant in compliance with the Civil Service Act, but as a part of the method of the city to construct a new water-works system pursuant to legislation enacted in 1927. (See Smith-Hurd 1931 Secs. 425 and 426). Under such legislation the city, by certain of its ordinances, which were before the court, pledged its entire water works system and plant for the issue of $1,250,000.00 in certificates of indebtedness and created a Board of Trusttes to receive and hold the property, income and earnings of the plant all of which to the extent of 90% were pledged for the running expenses of the plant and the payment of the certificates of indebtedness. By these steps the entire control and operation of the water-works system, including the collection and expenditure of funds, were given the Board of Trustees and it was authorized and empowered, by the same token, to select its employees and to define the duties and fix the salaries. When the new plant was completed and it was in operation an ordinance was passed by the city abolishing officers (including the one held by appellant), who had duties to perform before that time. This ordinance so abolishing the office held by appellant was

passed on January 10, 1929, or two days after appellant had been discharged, but it seems to have been a part of a logical plan adopted by the city that when the Board of Trustees was ready to operate and function, it should employ such persons as it deemed wise for the proper conduct of its business, and that being true, then the city, which had theretofore appointed certain persons to attend to these duties, had no further use for them and very properly abolished such offices.

The petition for mandamus was not filed until January 24, 1930, at which time there was no such office in the City of Waukegan to which appellant seeks to be re-instated and, therefore, he was not entitled to the relief asked.

In view of the fact that the court was authorized to take judicial notice of the ordinances of the City of Waukegan and of the provisions therein contained as affecting the city water-works and of the power and authority lodged in the Board of Trustees, as provided by law, it is quite apparent that appellant was not entitled to be re-instated and the judgment and order of the Circuit Court of Lake County will be and the same is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 617

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8390 Ag. No. 12

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1931

Marie A. Baker,

Defendant in error

vs. Error to the Circuit Court

Edward Baker, of LaSalle County

Plaintiff in error.

BALDWIN, J:

The record in this case discloses that on the second day of May, 1922, Marie Baker, hereinafter for convenience called "complainant," filed a bill in the Circuit Court of LaSalle County for a divorce from Edward Baker, hereinafter referred to as "defendant" for convenience, and in the bill she filed she charged extreme and repeated cruelty. Defendant answered her bill for divorce, but did not contest the charges as alleged in the bill. On the 11th of July, 1923, complainant obtained a decree of divorce and custody of their son, the question of alimony being reserved for a future hearing. On February 11th, 1924, a decree was entered awarding the complainant $325.00 alimony monthly and directing the defendant to pay certain bills. Defendant prosecuted an appeal to this court, which decree was reversed and an order entered reducing the monthly payment of alimony to the sum of $2000 yearly, or the sum of $166.67 monthly. A decree in accordance with the opinion of this court was entered in the Circuit Court below on February 9, 1925.

It appears that the defendant made default in his payments of alimony as was required in the decree entered February 9, 1925. The complainant filed her petition for rule to show cause, if any, why he had not complied with the order and decree of the

Com. No. 8393 No. 24

court, and in the petition she alleges, among other things, that the defendant was in arrears in the sum of $166.67 for the months of October, November and December, 1930, respectively. On the rule to show cause defendant came into court and filed a petition asking for the reduction of the monthly payments of alimony from $166.67 to the sum of $50.00 per month, alleging losses in the operation of his business, reduction in his yearly salary and financial reverses and losses due to a farm leasehold as his reason for failure to pay in accordance with the terms of the decree. An order was entered by the court on the rule to show cause on the 22nd day of December, 1930. After a hearing on March 3, 1931, the court entered an order denying the petition of defendant to reduce the amount of monthly alimony, did not discharge the rule entered against him and directed him to pay the sum of $1000 in accordance with the previous decree (which covered the three months which he was delinquent in the year 1930 and the three months in which he was delinquent for the year 1931 up to the time of the hearing by the court), and ordered him to pay the sum of $166.67 in accordance with the previous decree. It also appears from the record that the same Chancellor below heard all of these proceedings, including the original suit for divorce, the hearing on alimony at that time and the petition to show cause filed by complainant and entered the order upon which a writ of error is brought to this court for re-hearing.

It is contended that the court was in error in refusing to allow the petition for reduction of alimony; that the court erred in refusing to discharge the rule to show cause and that the court erred in ordering the defendant to pay the sum of $1000.00, and that the order as to past and future alimony is not supported by the evidence.

The complainant contends that the modificationof such a decree is addressed to the judicial discretion of the court; that

courts will not alter or modify such allowances, except where equity calls clearly for interposition; that past due alimony is a vested right and cannot be set aside by subsequent order of court; that the court is not limited in a case of this character to a portion of the income; that the wife is entitled to suitable support and that where a Chancellor hears and sees all of the witnesses his decree will not be reversed unless it is clearly apparent there is palable error in his actions, that, therefore, the decree of the Chancellor below in this proceeding should be sustained.

We have examined the record in this cause, together with the decree that was originally entered, and the decree entered after the cause had been to the Appellate Court and had been reversed.

The decree of 1925 found, among other things, that the complainant was without property and means of any kind belonging to her save certain articles of household furniture, that at that time she was nearly 51 years of age (now she is 57), partially broken in health, wholly unable to provide for her support in whole or in part, that defendant was a man still in the prime of life and apparently fully able to carry on successfully large business enterprises, that the right of complainant to occupy the home ceased on February 11, 1925, at which time she was to vacate said premises, that the decree did not give complainant any property other than as mentioned above and no provision is made therein for payments after the death of defendant.

It appears that since the rendition of the decree in 1925 complainant's father has died leaving her a 2/9 interest in some farm land, subject to the life estate of her mother. The land being worth from $30.00 to $35.00 an acre and consisting of about 700 acres, that she had not as yet received anything from the father's estate and that complainant has been required to pay out money for the purpose of settling up her

father's estate, that she has nothing except the alimony that she receives from her husand and that during the last six months she borrowed between $800.00 and a $1000.00 from her son in law in order to pay her actual living expenses, this being for the period in which defendant was in default in the payment of alimony that is now the subject of this writ of error. It, therefore, appears that her condition remains unchanged as compared to the condition which she was when the decree was entered in 1925.

Since that time the son, whose custody was awarded to the complainant, has married and defendant has been released from payment of $1000 per year towards his education and care. It also appears from the record that defendant has remarried and is now living with his wife in the homestead which was originally occupied by the complainant and defendant prior to the divorce. Defendant contends, and the proof corroborates him, that his business, being that of a wholesale grocer, has not been successful in the past year; that the inventory as of January 1, 1931 shows that the net assets of the company are $115,803.92 and that they have a total indebtedness of $10,580.00, which shows a net worth of $105,223.92. It appears that defendant owns 1272 shares ofstock in the company with a total capitalization of 1500 shares, and that his holdings are worth approximately and according to the inventory and testimony of approximately $98,000.00. In addition to this he owns the homestead, the value of which is not definitely disclosed. Defendant also has an interest in some land, subject to some other estates, and he has been leasing this land from those entitled to other interest, and he claims that he has operated this land at a loss for the last three or four years. The record discloses he has paid to himself each year approximately $250.00 out of the proceeds of the land operation on account of expenses, etc. It also appears that a barn burned on these premises and that he collected $1200.00 insurance and that so far as the record shows he still has the $1200,

father's estate, that she has nothing except the alimony that she receives from her husand and that during the last six months she borrowed between $800.00 and a $1000.00 from her son in law in order to pay her actual living expenses, this being for the period in which defendant was in default in the payment of alimony that is now the subject of this writ of error. It, therefore, appears that her condition remains unchanged as compared to the condition which she was when the decree was entered in 1925.

Since that time the son, whose custody was awarded to the complainant, has married and defendant has been released from payment of $1000 per year towards his education and care. It also appears from the record that defendant has remarried and is now living with his wife in the homestead which was originally occupied by the complainant and defendant prior to the divorce. Defendant contends, and the proof corroborates him, that his business, being that of a wholesale grocer, has not been successful in the past year; that the inventory as of January 1, 1931 shows that the net assets of the company are $115,803.92 and that they have a total indebtedness of $10,580.00, which shows a net worth of $105,223.92. It appears that defendant owns 1272 shares ofstock in the company with a total capitalization of 1500 shares, and that his holdings are worth approximately and according to the inventory and testimony of approximately $98,000.00. In addition to this he owns the homestead, the value of which is not definitely disclosed. Defendant also has an interest in some land, subject to some other estates, and he has been leasing this land from those entitled to other interest, and he claims that he has operated this land at a loss for the last three or four years. The record discloses he has paid to himself each year approximately $250.00 out of the proceeds of the land operation on account of expenses, etc. It also appears that a barn burned on these premises and that he collected $1200.00 insurance and that so far as the record shows he still has the $1200,

but he claims that he holds it for the purpose of restoring the barn on the premises. It also appears that there are about 500 bushels of oats and approximately 1000 bushels of corn which have not been sold. From a resume of the record from which the foregoing facts have been gleaned it thus appears that the defendant has property of the value of more than $100,000.00 at this time and that the complainant has nothing and depends solely and entirely upon the alimony to be paid her by her husband. In the original case, which was before us for review in 1925, it was disclosed that practically all of this property had been accumulated during the years in which the defendant and complainant lived together as husband and wife and none of it was decreed to be turned over to complainant. The only relief in that respect being alimony to be paid so long as the defendant should live.

Our courts have held that past due alimony under a decree is a vested debt and cannot be set aside or times of payment changed by a subsequent order of court (See Craig vs. Craig 163 Ill. 176) and this seems to dispose effectually as to one of the grounds for error alleged, and it seems to be the rule in this court that, even though one may be in contempt for not having made payments of alimony as directed in a decree, yet, the court may entertain a petition to modify the decree with respect to future payments (See Craig vs. Craig, supra) and this is also contemplated by the statute. It would appear from the record in this case that it is necessary for complainant to have $166.67 per month for the purpose of paying her living expenses and it is the rule in this state that she should have not merely what necessity demands, but what complete justice requires (See Decker vs. Decker, 279 Ill. 300) and that in allowing and reviewing such allowances the ages, health, past and present habits, social conditions and circumstances should be taken into consideration.

It has been further held by our courts that, where there is a small income and the payment of an allowance for alimony will result in diminishing the estate from which the income is derived, it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. (See Harding vs. Harding, 144 Ill. 588) Thus, it would appear that, even though income of defendant has been reduced since the former decree was entered and that the payment of $2000 per annum would absorb the major portion of it as it now is proven to be, yet, where he has property worth more than $100,000.00 and the complainant has nothing it is still necessary for the defendant to find ways and means by which he can afford his wife the actual necessities of life.

Defendant has cited the case of Harding vs. Harding, 180 Ill. 481, on the point that the husband's faculties, respective incomes and effect upon husband's business are to be considered in a cause like this, but a careful reading of that lengthy opinion will disclose that nothing like the conditions therein set forth appear in this case and, therefore, the case is not an authority for the correction of the alleged error herein in our judgment.

The defendant cites the cases of Thompson vs. Mentzer, 216 App. 470, and Barclay vs. Barclay, 184 Ill. 471, as authority for the proposition that the court has power to modify payments of past due alimony. The appellate case thus cited is not at all like the instant case and the statement in the Barclay case upon which defendant relies is mere dicta and was not essential to the decision in that case.

After thoroughly examing the records in this case as a whole we are thoroughly convinced that the Chancellor who heard the petition of complainant and likewise the petition of defendant for a reduction of alimony was justified in arriving at his decision in entering the order requiring defendant to make pay-

ments wherein he had made default and also in refusing the petition of the defendant for a reduction of alimony. The same Chancellor below has heard every phase of this case in all of its proceedings and as stated in Pribyl vs. Pribyl 250 Ill. App. 349, "It is well settled that where a Chancellor hears and sees all of the witnesses, his decree will not be reversed unless it is clearly apparent that there is palpable error and the evidence manifestly preponderates in favor of the defeated party."

There seems to us to be no palpable error in this case on the part of the Chancellor and the evidence does not manifestly preponderate in favor of the defendant, therefore, the order and decree of the Circuit Court of LaSalle County in this cause is hereby affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 617

BE IT REMEMBERED, that afterwards, to-wit: On FEB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8415 Agenda No. 57

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM A. D. 1931

J. D. Frye and Ella J. Frye, Appellants,	)	Appeal from the
-vs-	)	Circuit Court of
C. C. Bargreen, Appellee.	)	La Salle County

Baldwin, J.

This is an appeal from LaSalle County to reverse a judgment in favor of the appellee (herein referred to as defendant) in the Circuit Court of that County.

The declaration in this case consisted of four counts, the first count alleged that during the summer of 1929 the home of the plaintiffs (appellants here) was destroyed by fire and that the defendant entered into an oral contract with the plaintiffs and an insurance company to repair the damage and to furnish labor and materials therefor.

It was further alleged that the defendant submitted an estimate of the cost of such repairs and agreed that such defendant in the performance of such work would save as much of the house as possible and that any labor or materials that could be saved from the estimate would be allowed to the plaintiffs as a reduction from the said estimate. It was also alleged that when such repairs were in part completed the plaintiffs paid to the defendant the sum of $1359.10 and upon the final completion thereof the plaintiffs paid to the said defendant the further sum of $747.82.

General No. 8413

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1. D. Frye and Ella J. Frye,

Appellants,

-vs-

C. C. Bergren,

Appellee.

Baldwin, J.

This is an appeal from Lassalle County to reverse a judgment in favor of the appellee (herein referred to as defendant) in the Circuit Court of that county.

The declaration in this case consisted of four counts, the first count alleged that during the summer of 1908 the home of the plaintiffs (appellants here) was destroyed by fire and that the defendant entered into an oral contract with the plaintiffs and an insurance company to repair the damage and to furnish labor and materials therefor.

It was further alleged that the defendant submitted an estimate of the cost of such repairs and agreed that upon defendant in the performance of such work would save as much of the house as possible and that any labor or materials that could be saved from the estimate would be allowed to the plaintiffs as a reduction from the said estimate. It was also alleged that when such repairs were in part completed the plaintiffs paid the defendant the sum of $1800.00 and upon the final completion

It is further alleged that thereafter the plaintiffs learned that the defendant did not give proper credit and the plaintiffs claim a credit of $780.57. Subsequently a statement of claim was filed claiming credits in the sum of $1302.28.

The second count consisted of the common counts for goods sold and delivered. The third count was the consolidated common counts. The fourth count was upon account stated and alleged damage of $780.57.

The defendant filed a general issue to this declaration. Trial was had before a jury on April 2nd, 1931, and resulted in a verdict for the defendant. Motion to set aside the verdict and for a new trial being denied, judgment was rendered on the verdict and this appeal is prosecuted.

The plaintiffs lived at Long Point, Illinois. A fire occurred on August 30th, 1929 and their home was badly damaged.

Plaintiffs' property was insured by two insurance companies through a representative at Streator, Illinois. Soon after the fire, an adjuster for the insurance companies, together with their representative and the defendant herein and some other persons, made an inspection of the damaged property and the defendant at the request of the adjuster of the insurance companies prepared an estimate of the cost of repairing the damage; Considerable discussion took place between the respective parties but the final estimate agreed upon was $2208.92; Thereafter the defendant entered upon the repairing of such house. Ultimately settlement was made in the amounts and in the manner set forth in the declaration.

It is claimed on behalf of the plaintiffs that they are entitled to additional credits and thereby the defendant was over paid; that such contract amounted only to an agreement to perform certain work and furnish materials at the estimated prices.

It is claimed on behalf of the defendant that the contract was for the performance of the labor and furnishing materials, etc., for the contract price of $2244.92 and that after the work had been completed and after credits were allowed and extras charged, full and complete settlement therefor was made and the transaction closed.

The first payment of $1359.10 was made to the contractor by an insurance company check payable to the plaintiffs herein, who endorsed such check and delivered the same to the defendant.

The evidence also discloses that the remainder of the money, regardless of how paid, was from the proceeds of a settlement with such insurance companies.

There is a very decided conflict in the testimony in this case not only as to the work performed and the money to be paid but as to the actual terms and conditions of the contract itself and of the service to be performed and materials to be furnished thereunder.

This court and the Supreme Court of this State have on numberous occasions held, that where there is a conflict in the testimony of the various witnesses, then the matters of fact become and are questions for the jury. The jury see and hear the witnesses and are in a better position to pass upon the credibility of the respective witnesses and to determine the weight to be attached to their testimony and each of them, and in cases where there is such conflict in the testimony the courts rarely, if ever, are inclined to disturb the verdict of the jury as to such questions of fact. Adams vs E. & B. E. Co., 204 Illinois Appellate 1; Medearis vs Balenseifen, 205 Illinois Appellate 142.

In this case the jury having observed the witnesses, and their manner of testifying and having heard the testimony and having been in the best position to determine the weight of the testimony and the credibility to be attached to the

respective witnesses, this court is not inclined to set aside their verdict unless there is other error in the record.

Objection is made by the appellant to the refusal of the court to give the jury plaintiffs' refused instructions No. 4 and 5. These instructions were properly refused by the court for the reason that the same were not on harmony with the theory upon which the plaintiffs tried their case in the Circuit Court.

Appellant further complains of the giving of defendant's instruction No. 2 but we hold that this instruction is a correct statement of the law and that the court did not err in giving same.

Appellant further complains of the giving of defendant's instruction No. 3. This instruction is not subject to the criticism made by the appellant in this case, although this court is of the opinion that such instruction was entirely too long and such lengthy instructions are not favored by the courts, yet there was no reversible error in the giving of this instruction by the court.

The evidence in this case disclosed that the defendant performed the work and apparently in a manner satisfactory to the plaintiffs and at the conclusion thereof submitted his bill to the pla intiffs for the balance he claimed to be due him under the contract (Plaintiffs' Exhibit 3) and was paid in accordance therewith. This statement contained credits for items he claimed had been ordered changed by the plaintiffs.

Some reference is made to the question of fraud, but fraud is never presumed but must be proven like any other fact and the burden of proof of any fraud was upon the parties alleging same. Union National Bank vs State National Bank 168 Illinois 256; Carter vs Carter 283 Illinois 324.

Under all the circumstances in this case we are of the opinion that the plaintiffs have failed to establish any fraud

of the defendant in obtaining settlement in this case.

The jury under proper instruction from the court has determined all questions of fact in this case, adverse to the claims of the appellant.

Finding no reversible error in this case the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 617

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 13 1932

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8439 Agenda 30

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM A. D. 1931

HARRY B. BROWN, Admr. etc., Appellee -vs- THE CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY Appellant	Appeal from the Circuit Court of La Salle County.

Baldwin, J.

This is an appeal from the Circuit Court of La Salle County, Illinois, prosecuted to reverse a judgment of $3,500.00 herein, brought by said Administrator to recover damages for wrongful death of Catherine Brown, alleged to have been caused by the negligent act of the defendant railroad company.

The declaration upon which this trial was had consisted of three counts: The first count alleged ownership and operation of the railroad; duty to give warning by ringing bell, blowing whistle; duty to provide signal bell and flagman and not to run train at speed in excess of ten miles per hour and that by reason of defendant's negligence in performing such duties the plaintiff's intestate was killed.

The second count charged general negligence and the third count failure to provide flagman.

It is contended on behalf of the appellant that plaintiff's intestate was guilty of contributory negligence; that the Court erred in refusing to direct a verdict for the defendant; that the verdict is not supported by a preponderance of the evidence and that the Court erred in the giving of instructions.

Cen. No. 6830

Appeal fr

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM A. D. 1921

HARRY D. SMITH, Adm. etc.,

Appellee

-vs-

THE CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY

Appellant

Appeal from the Circuit Court of La Salle County.

Baldwin, J.

This is an appeal from the Circuit Court of La Salle County, Illinois, presented to review a judgment of $3,500.00 herein, brought by said Administrator to recover damages for wrongful death of Delberine Beem, alleged to have been caused by the negligent act of the defendant railroad company.

The declaration upon which this trial was had contained two counts. The first count alleged wantonness and disregard of the railroad; duty to give warning by ringing bell, blowing whistle; duty to provide signal bell and flagmen and not to run train at speed in excess of ten miles per hour and that by reason of defendants negligence in performing said duties the plaintiff's intestate was killed.

The second count charged general negligence and the third count failure to provide flagmen.

It is contended on behalf of the appellee that plaintiff's intestate was guilty of contributory negligence; that the Court erred in refusing to direct a verdict for the defendant; that the verdict is not supported by a preponderance of the

On the question of the negligence of the defendant, it was unquestionably for the jury to determine, as a matter of fact, whether or not the bell rang, the whistle sounded, or the gong at the crossing sounded, and the defendant company have a flagman at his post to warn the plaintiff's intestate of the approach of the west-bound train.

It is the law in this State that where there is no danger apparent, one need look no further than to observe the flagman and follow his actions and observe his warning, and if he gives no warning, the pedestrian has a right to assume that it is safe to cross, such pedestrian being accorded the benefit of the presumption that every person will perform a duty enjoined by law or imposed by contract and that the negligence of the defendant need not be anticipated. In this case a flagman was stationed at this crossing, whose duty it was to warn pedestrians and vehicles of danger while trains were crossing over. See C. & A. R. R. Co. vs. Adler 129 Ill. 335; C. & A. R. R. Co. vs Blaul, 175 Ill. 183.

In Deheave v. Hines, 217 Ill. App. 427, on page 431, the Court said:

> "The flagman was placed there to direct the traveling public when to and when not to cross the tracks of plaintiff in error. It was his duty to know when it was safe to cross and when not (Chicago & A. R. Co. v. Adler 129 Ill. 335; Chicago & A. R. Co. v. Blaul, 175 Ill. 183) and all persons desiring to cross there had a right to assume that the flagman did know and would faithfully warn them if it was not safe to cross."

Whether the defendant was negligent and whether the plaintiff's intestate was guilty of contributory negligence, were questions of fact to be determined from a consideration of the testimony of all the witnesses. There is much conflict in the testimony of the respective witnesses produced in this case and in such cases the Courts of this State have uniformly held that under such circumstances questions of fact are to be submitted to the jury for its determination. The jurors see and hear the witnesses and it is their duty to weigh the evidence and reconcile the conflicting testimony, if possible, and

determine the weight to be given the testimony of the respective witnesses and from a full consideration thereof to determine upon which side the evidence preponderates. And although this court might have decided the issues differently had the case been originally decided by it, yet when the jury has heard and determined the cause, appellate tribunals will not, as a rule, disturb the verdict of the jury, even though it appears to be against the strength of the testimony, unless the Court can say that the verdict is so manifestly against the weight of all the evidence that the verdict cannot be supported thereby.

In Illinois Central Railway Company vs Gillis, 68 Illinois 317 page 319 the Court said:

> If any rule of this Court can be so well established as to be neither questioned nor require citation of authority to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony.

In Shevalier vs Seager, 121 Illinois 564 page 569 the Court said:

> The truth is, the rule could not be otherwise, without invading the province of the jury to determine the credibility of witnesses, and to say which of them are to be believed in case of a conflict. To do this would be to discuss with the functions of a jury and thus destroy its utility all together.

There are many other cases of the Courts of this State holding to like effect.

This case was previously before this Court (225 Illinois Appellate 647) and was reversed because of the absence of evidence to support a wilful and wanton count and for error in instructions and the substantial facts in the case as now before us, were detailed therein. Two juries have now heard the evidence and observed the witnesses and have had opportunity to weigh the testimony and reconcile the evidence and to determine the preponderance of the evidence. Both juries have decided in

favor of the plaintiff - thereby indicating a finding upon controverted testimony that the defendant was negligent and that such negligence caused the injury and that plaintiff's intestate was free from contributory negligence and this verdict should be sustained unless there is other error in the case prejudicial to the appellant.

Objection is made to appellee's third and fourth instructions. It is urged that the word "only" as used in instruction number three is intended to minimize the degree of care required. While it is possible that such use of the word might be susceptible of such construction, yet from an examination of the other instructions in this case it is apparent the jury were given ample instruction on this point and that the giving of this instruction was not prejudicial or reversible error.

Under the allegations in the second count of the declaration instruction number four was a proper instruction and correctly stated the law, and such instruction is not subject to the defects urged.

For the reasons stated the judgment of the Circuit Court should be sustained and it is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 618

BE IT REMEMBERED, that afterwards, to-wit: On FEB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8450 Agenda No. 39

MARY POCIVAVSEK,
Appellee
-vs-
JOHN BRABENDER AND JOSEPH WOODSHANK,
Appellants

Appeal from the Circuit Court of La Salle County.

Baldwin, J.

This is an action in debt. Plaintiff filed her declaration consisting of the common counts, against John Brabender. With the common counts an affidavit of merits was filed signed by the plaintiff alleging that the defendant Brabender was indebted to the plaintiff in the sum of $641.00. Summons was issued and Brabender came into court and filed a plea to the jurisdiction of the court which was overruled and then filed the general issue and an affidavit of merits on March 11, 1929.

At the June term of the La Salle County Circuit Court, 1930, motion by plaintiff was made to make Joseph Woodshank a party defendant to the suit. Said motion was allowed. Woodshank was made a party defendant, summons was issued for Woodshank returnable to the October term of said court. At the same time leave was granted to amend the declaration, but so far as the abstract of record is concerned, there appears no amendment to the declaration was ever made. Woodshank filed a plea of the general issue and at the March term, 1931, the case was called for trial. By agreement of parties a jury was waived and the cause submitted to the court. After the evidence was heard in the case, on motion of the plaintiff, the defendant John Brabender was dismissed out of the suit. The court took the case under advisement and later found the issues for the plaintiff as against John Woodshank and assessed damages at $686.40. After motion for new trial and in arrest of judgment, etc., defendant

General No. 8450

Agenda No. 70

MARY POOLIAVSEK,

Appellee

-vs-

JOHN BRABENDER AND JOSEPH WOODSHANK,

Appellants

Appeal from the
District Court of
La Salle County.

Baldwin, J.

This is an action in debt. Plaintiff filed her declaration consisting of the common counts, against John Brabender. With the common counts an affidavit of merits was filed stating that the plaintiff alleging that the defendant Brabender was indebted to the plaintiff in the sum of $[illegible]. Subsequently the issues were joined and the cause came into court and filed a plea to the jurisdiction of the court which was overruled and then filed the general issue and an affidavit of merits on March 11, 1857.

At the June term of the La Salle County Circuit Court, 1859, motion by plaintiff was made to make Joseph Woodshank a party defendant to the suit. Said motion was allowed. Woodshank was made a party defendant, summons was issued for Woodshank returnable to the October term of said court. At the same time there was entered to amend the declaration, but as for as the contents of record is concerned, there appears no amendment to the declaration was ever made. Woodshank filed a plea of the general issue and at the March term, 1861, the case was called for trial. On agreement of parties a jury was waived and the cause submitted to the Court. After the evidence was heard in the case, motion of the plaintiff, the defendant John Brabender was dismissed out of the suit. The court took the case under advisement and finally found the issues for the plaintiff as against both defendants and assessed damages at $[illegible]. After motion for new trial and in arrest of judgment, etc., Brabender

prayed for an appeal and brings the case to this court on appeal.

The evidence shows that appellee's husband died several years prior to the controversy and that appellant Woodshank settled the estate; that he paid over the major part of the estate to appellee, but retained $1000 with the consent of the appellee and paid her interest regularly on said $1000. The only evidence of this indebtedness was a paper in the form of a receipt acknowledging his indebtedness to the appellee as set forth on Page 7 of the abstract, which is as follows:

"Exhibit 1.

Peru, Illinois May 2 1922

RECEIVED from .....Mrs. Mary Pocivavsek.....

One Thousand & no/100.....dollars

.....

$1000.00 (Signed) JOSEPH WOODSHANK

(Endorsed on the back as follows:)

May 2nd 1925 Paid on Principal $400.00 balance due me."

The evidence is undisputed that Brabender came to Woodshank and asked him to borrow $600; that Woodshank told Brabender that he did not have the money himself, but that he was paying Mrs. Pocivavsek $1000 in a few days and that perhaps he could borrow the money from her. Brabender and Woodshank went to see Mrs. Pocivavsek and while the evidence is somewhat conflicting, we think it tends to show that Mrs. Pocivavsek consented to have Woodshank pay over to Brabender the $600. At this time, the evidence in uncontradicted that Woodshank paid Mrs. Pocivavsek $400 and interest and that Brabender also paid Mrs. Pocivavsek $36 which he claims was interest in advance on the loan of the $600.

Brabender paid interest at one time to Mrs. Pocivavsek on this $600 and at one time paid interest to Mrs. Pocivavsek's attorney. The affidavit of claim filed in the case filed by the appellee says that Brabender is the party that owes her the $600. The evidence is uncontradicted that Woodshank went to the building and loan association and borrowed $1000 for the purpose of paying

"Exhibit I.

Penn, Illinois May 2 1902

RECEIVED from .....Mrs. Mary Podiavsek.....

One Thousand & no/100.....dollars

.....

$1000.00 (Signed)

(Endorsed on the back as follows:)

May 2nd 1905 Paid on Principal $400.00 Balance due

$600."

The evidence is sufficient to prove that Podiavsek and asked him to borrow $600; that Podiavsek told Trabouler that he did not have the money himself, but that he could borrow the money from Mrs. Trabouler and Podiavsek went to see Mrs. Podiavsek; and while the evidence is somewhat conflicting, we think it tends to show that Mrs. Podiavsek consented to give Podiavsek the $600. At this time, the evidence is uncontradicted that Podiavsek paid Mrs. Podiavsek $400 and interest and that Podiavsek also paid Mrs. Podiavsek $18 which he claims was interest in advance on the loan of the $600.

Trabouler paid interest at the time to Mrs. Podiavsek on this $600 and at one time paid interest to [illegible] attorney. The testimony of Alwin Tjark in the case tried by the Justice was that Trabouler in the court that $600. The evidence is uncontradicted that Podiavsek and Joan association and borrowed $600 for the purpose of paying

off his indebtedness to the appellee. At the time of the trial Brabender acknowledged that he owed the money to the appellee. (Abs. p. 22). From the evidence in this case we are of the opinion that the verdict is contrary to the manifest weight of the evidence and should be reversed.

There is some technical objections to the declaration that it had not been amended and the abstract does not show that it ever was amended and that there was no affidavit of claim filed stating that Joseph Woodshank was ever indebted to the plaintiff. However, we do not deem it necessary to pass upon these facts on account of the case being reversed on the weight of the evidence.

The only evidence to sustain plaintiff's contention was that of plaintiff herself and her lawyer John Massieon who had acted as her agent in collecting interest on the $600. The evidence shows (ab. p. 12) that his dealings were with Brabender, except the time that $51 was paid by Woodshank and the time he paid the money to the attorney he stated he was paying it for Brabender and the receipt was given in John Brabender's name. (Ab. p. 12).

We think that appellee released appellant and accepted Brabender and afterwards further acknowledged this arrangement by taking interest from Brabender herself and by her attorney. It seems to us on this evidence that it was an afterthought on appellee's part to seek to hold Woodshank.

This judgment being clearly against the weight of the evidence in this case, the judgment is reversed and remanded.

Reversed and remanded.

Ester
20-32

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 618

BE IT REMEMBERED, that afterwards, to-wit: On FEB 10 32 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8459

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

S. B. Geiger

appellee

vs.

City of Rockford

appellant

Appeal from Circuit Court of

Winnebago County

Baldwin, J:

This is a suit brought to recover the sum of $4915.45.

The declaration as finally used consisted of one special amended count in which it was alleged that the plaintiff, appellee here, made a contract with the defendant, appellant here, about April 15th, 1920 to dig four artesian wells; that the plaintiff in entering upon the said contract relied upon representations of the defendant that Galena and Trenton lime stone rock underlaid the proposed sites of the wells at a depth of not to exceed twenty-two to fifty feet; that after beginning to dig the wells the plaintiff found that at some of the wells the bedrock laid below the surface at about ninety feet; that by reason thereof the plaintiff became and was obligated to and did do a large amount of extra work and furnish extra materials and that the City engineer was in charge of the execution and interpretation of the contract; that the plaintiff continued the digging of said wells and in no way delayed the execution of the work but notified the defendant of his finding the rock at a depth of ninety feet and of the resulting additional work necessarily following; that the plaintiff put in his claim against said City of Rockford for the cost of such extras and requested the engineer to decide the question and make his findings as to whether he was entitled to extra pay; that on July 29th, 1922

Gen. No. 8459

E. A. Geiger

appellee

vs.

City of Rockford

appellant

Appeal from Circuit Court of
Winnebago County

Baldwin, J:

This is a suit brought to recover the sum of $400.00.

The declaration as finally used consisted of one special count in which it was alleged that the plaintiff, appellee here, made a contract with the defendant, appellant here, about April 10th, 1920 to dig four artesian wells for the plaintiff in entering upon the said contract said appellee and the defendant that below the said wells was a stone rock underlaid the proposed sites of the wells at a depth of not to exceed twenty-two to fifty feet that after beginning to dig the wells the plaintiff found that at some of the wells the bedrock lay below the surface at about that by reason thereof the plaintiff became and was obliged to and did do a large amount of extra work and furnish extra materials and that the City entered into a change of the specifications and interpretation of the contract; that the plaintiff continued the digging of said wells and in no way delayed the execution of the work but notified the defendant of its finding the rock at a depth of ninety feet and of the resulting additional work necessarily following; that the plaintiff for to its claim demand said City or thereof for the sum of $400.00 and refused the manner to decide the question and make the [illegible] to whether he was entitled to extra pay; that on July 20th, 1921

the engineer made his findings; that neither party filed written objection to the recommendation and that the recommendation became binding on the defendant; that the plaintiff did do the extra work and furnish extra materials and that the defendant refused to pay the $4915.45.

There was considerable pleadings in the case and much controversy concerning the sufficiency of an affidavit of merits.

Ultimately trial was had. The jury returned a verdict finding the issues for the defendant.

After motion for a new trial was overruled an appeal was taken to the Appellate Court of the Second District where the judgment was reversed and the cause remanded to the trial court for further proceeding.

The Appellate Court by its first opinion (Geiger vs. City of Rockford, 244 Ill. App. 657) found that the alleged extra work and material was not in fact extra work outside of the contract between the parties and not specified by it, but that it was work and materials contemplated by the contract and recovery therefor, if any, must be had under such contract. The court further held that by the terms of the contract the estimated quantities of work and materials to be furnished were approximate only and that the basis of payment to contractor was the actual work performed and labor furnished. This court also found that the engineer of the defendant had reported upon the claim of plaintiff (finding he was entitled to $4915.45) in accordance with his duty as specified in the contract and that it is binding upon the appellee in the absence of fraud or mistake.

Thereafter a second trial was had prior to which the defendant filed certain additional pleas together with an affidavit of merits and upon the termination of the said trial the plaintiff filed a motion to strike the general issue and the affidavit

the engineer made his findings; that neither party filed written objection to the recommendation and that the Commonwealth (whose binding on the defendant) that the plaintiff was by the action was and furnish extra materials and that the defendant refused to pay the $4813.45.

There was considerable pleading in the case due to controversy concerning the sufficiency of the affidavit of merits.

Ultimately trial was had. The jury returned a verdict finding the issues for the defendant.

After motion for a new trial was overruled an appeal was taken to the Appellate Court at the Second District where the judgment was reversed and the cause remanded to the trial court for further proceeding.

The Appellate Court by its [illegible] (Cooper vs. City of Joliet, 244 Ill. App. 457) found that the allowed extra work and material was not in fact extra work or material but [illegible] between the parties and not specified by it, nor that it was work and materials contemplated by the contract and necessary thereto, if any, must be had under such contract. The court further held that by the terms of the contract the engineer could [illegible] and materials to be furnished were sufficiently and that the basis of payment to contractor was the actual work performed and labor furnished. This court also found that the [illegible] of the defendant had reported upon the claim of plaintiff (finding of was entitled to [illegible] in accordance with its duty [illegible] in the contract and that it is clothed upon the [illegible] absence of fraud or mistake.

Thereafter a second trial was had which [illegible] tendered files one [illegible] of merits and upon the [illegible] of the said trial the plaintiff filed a motion to affirm the general issue on the affidavit

of merits from the case upon the ground that in the opinion of the Appellate Court the only triable issue was one of fraud or mistake and that these defenses were not put in issue under the general issue and affidavit of merit. This motion was allowed and a judgment for $4915.47 was entered by the trial court.

The case was then again appealed to the Appellate Court for the Second District of Illinois and the cause was again reversed by the Appellate Court (Geiger vs. City of Rockford, 250 Ill. App. 657). The court found by its second opinion that the defendant had pleaded payment (among other things) and that the question of payment was a matter to go before the jury.

The cause was again redocketed for the trial and the defendant filed a special notice of defense to be given under its general issue that the award of the engineer was not intended as an award but as a recommendation and that if it was an award it was by mistake. No fraud was alleged or claimed in such notice.

A motion was made by the plaintiff to strike this motion, which was denied. Thereafter certain other motions were made for judgment as in cases of default, which were overruled.

A third trial was had before a jury upon the same amended special counts, the common counts and upon the defendants special notice of defense and plea of payment.

The plaintiff introduced substantially the same testimony that it had in the first case, including the documentary evidence as to the contract, the various documents construing the same, the report of the engineer, etc. There was also a stipulation that the engineer would testify to certain matters if he were present.

At the close of the plaintiff's testimony the defendant elected to offer no evidence whatever. Thereupon the plaintiff made a motion for a directed verdict, which was granted and judgment entered against the defendant for $4915.47.

The law and all the facts in this case, except the question of payment, have been decided by the Appellate Court in the former decisions in this case, supra.

Those decisions have found the facts in the case (except that of payment) and the law applicable thereto and are binding on all courts. People v. Militigee, 301 Ill. 284.

The court held upon the first appeal that the so-called extras were simply additional units furnished to the city under the terms and conditions of the contract and were such matters as was within the contemplation of the contract and that the same were payable thereunder; that the plaintiff's engineer had by his report found the sum of $4915.47 due the contractor on account of such extra work and materials and that under the contract that report was made by the engineer in the line of his duty as specified in the contract and that it was binding upon the appellee in the absence of fraud or mistake. This seems to establish absolutely the right of the plaintiff to recover unless the defen ant proved its plea of payment.

Upon the last trial the defendant offered no testimony whatever and did not in any sense undertake to establish its plea of payment. Payment is a matter of defense and to be availed of as a matter of defense must be proven by the defendant. The defendant in this case offered no testimony whatever to establish such plea.

There being no evidence in the record as to payment, then the testimony of plaintiff (Abs. 53) that he had not been paid the sum of $4915.47 the amount claimed b' him, must be taken as proven.

We believe that the trial court correctly allowed the motion for directed verdict and correctly entered judgment for $4915.47 and that the judgment of the trial court in this case should be affirmed.

The judgment below is hereby affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 618[3]

BE IT REMEMBERED, that afterwards, to-wit: On FEB 19 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8469 Agenda 51

IN THE

APPELLATE COURT SECOND DISTRICT

OCTOBER TERM 1931.

GEORGE D. WAGNER, Appellee -vs- TOLEDO, PEORIA and WESTERN RAILROAD CO., Appellant	Appeal from the Circuit Court of Peoria County.

Baldwin, J.

This is an appeal from the Circuit Court of Peoria County prosecuted to reverse a judgment of that Court, in favor of the appellee for personal injuries and for damages to automobile in the sum of $5,000.00.

The declaration in this case consisted of five counts, the first count charging general negligence. The second count alleged that no bell was rung or whistle blown as required by the statute. The third count alleged failure of the appellant to comply with a certain statute of this State requiring signs to be posted at railroad crossings. The fourth count alleged the failure of the appellant to give sufficient warning of the approach of the train. The fifth count alleged, as negligence, the failure of the appellant to maintain signs, gates, flagmen, etc., as warning to persons on the highway of the presence of said railroad tracks.

To this declaration the appellant interposed a plea of general issue. Trial was had and a verdict of the jury for the appellee for the sum of $5,000.00. A motion for a new trial

Gen. No. 8469 Agenda 21

IN ERR

APPELLATE COURT--CHICAGO DISTRICT

OCTOBER TERM 1901.

GEORGE D. KRAMER,

Appellee

-vs-

TOLEDO, PEORIA and WESTERN RAILROAD CO.,

Appellant

Appeal from the Circuit Court of Peoria County

Baldwin, J.

This is an appeal from the Circuit Court of Peoria County prosecuted to reverse a judgment of that court, in favor of the appellee for personal injuries and for damages to automobile in the sum of $2,000.00.

The declaration in this case contained five counts, the first count charging general negligence. The second count alleged that no bell nor whistle blew as required by the statute. The third count alleges failure of the appellant to comply with a certain statute of this State requiring steam to be heated at railroad crossings. The fourth count alleged the failure of the appellant to give sufficient warning of the approach of the train. The fifth count charged, in addition to the failure of the appellant to comply with the statute, as aforesaid, the negligence, etc., as aforesaid to persons on the highway at the crossing of said railroad tracks.

In this declaration the appellee claimed [illegible] of personal injury. Trial was had and a verdict of [illegible] for the appellee for the sum of $2,000.00. A motion [illegible]

was over-ruled, judgment rendered on the verdict of the jury, and the appellant prosecutes this appeal.

There is little difference between the parties as to the major portion of the facts in the case. It is undisputed that the appellee was driving a Nash Coach in an Easterly direction upon Highway known as Highway 24, crossing the bridge known as the Lower Free Bridge lying between the City of Peoria and East Peoria, Illinois, about nine o'clock at night on March 18th, 1930 and that a collission occurred between such automobile and a locomotive at the point where the railroad tracks of the appellant intersect and cross State Route 24, herein usually referred to as West Washington Street, and as a result thereof the appellee was greatly injured and the automobile destroyed and the engine of the appellant had certain angle irons and a foot board on the locomotive broken and bent so they had to be removed.

A short distance East of the Easterly terminus of this bridge State Highway No. 8 connects with highway No. 24 upon the Northerly side of said Route 24; These two roads seem to more or less parallel each other for some distance and between the two highways is the railroad right of way of the appellant herein. State Route No. 8 is North of and Parallels this railroad right of way for a distance of approximately two miles.

As the appellee crossed the bridge driving his automobile in an Easterly direction a train of the appellant, consisting of a locomotive and several cars attached, was being driven westward by servants of appellant upon the tracks of the said railroad. At a point about ninety feet East of the Eastern terminus of the bridge the tracks of this railroa d cross Highway No. 24 at a very sharp angle.

There is a very heavy travvic over these roads and

across this bridge. At times as many as a thousand cars per hour pass over this point.

At the time of the collision the railroad company did not have or maintain any signs or other warning signals erected on a post at the point of intersection containing the words "Railroad Crossing" or similar language.

Where the railroad tracks cross the highway that portion of the roadway between the tracks and on either side of the tracks is built up of steel blocks making a smooth crossing practically flush with the pavement.

There was a large light upon one of the cross arms of the bridge and at the time of the accident there were various business houses located upon and along the two highways above referred to, most of which were well lighted on the occasion of such accident. There were other cars upon the road, all of which contained lights.

As the appellee drove upon the crossing of the railroad his automobile and the engine of the appellant collided. The right hand front side of the automobile struck or was struck by the right hand front side of the locomotive. The automobile was almost completely demolished and the angle irons and step on the right front side of the locomotive were bent back toward the front wheel on the right hand side of the locomotive and had to be removed.

The only questions in this case (upon which there is real controversy) are whether the appellant was negligent in the operation of the train and maintaining or giving warning and thereby caused the injury of the appellee and whether the plaintiff exercised reasonable care and caution for his own safety.

It is strongly urged by the appellant that there was no negligence upon the part of the appellant and that the appellee was guilty of contributory negligence. It is urged on the part of the appellee that the evidence supports the allegations

of the declaration that the appellant was negligent and that the appellee exercised reasonable care and caution for his own safety.

The first question to be decided is what the defendant, the Railroad Company, did whereby their negligence contributed to or caused injury to the plaintiff. We think that it was a question of fact for the jury to determine, as charged in the 4th and 5th counts under all the circumstances of the case, this being a crossing where hundreds crossed daily, we are inclined to agree with the jury that it was negligence on the part of the Railroad Company not to maintain a flagman, signs, bell or some other kind of a device with which to warn people that tracks of the railroad were there, and that trains might cross the hard road at any time. This same question was involved in Goodman vs. C. & E. I. Ry. Company 248 Ill. App. at 133. It was there held that this was a question for the jury to decide under all the circumstances. In the present case the jury found that it was negligence on the part of the Railroad Company.

The other question arising upon this record is-- was the plaintiff in the exercise of reasonable care for his safety. An examination of the record discloses some dispute that the plaintiff was wholly ignorant that there were any tracks crossing the road, never having been over this particular part of the road but once before, coming into Peoria from the East over Route 8 and turned to the right of the bridge and so far as the record discloses had no knowledge of the railroad tracks to the left as he crossed the bridge. An examination of the photograph introduced in evidence by the railroad company discloses that if you look down the road the railroad track is scarcely discernable, being flush with the roadway and at night a person not aware that the tracks were there would have difficulty

in noticing these tracks.

It seems to be the rule in this State that a person crossing railroad tracks must approach the same with the amount of care commensurable with the knowledge of danger. (See Greenwall vs. Baltimore and Ohio R. R. Co. 332 Ill. 627.)

The evidence discloses that he was probably going between ten and fifteen miles per hour as he approaches the crossing, that he was looking for the road that turned to the left. Under all the circumstances we think it is a question of fact for the jury to decide whether the defendant was guilty of any contributory negligence in driving the car in the manner he did as he approached this scene of what afterwards proved to be the accident.

There is a very sharp conflict between the testimony of witnesses for the appellee and of the witnesses for the appellant and in such cases the courts of this state have almost uniformly held the question of negligence and due care and caution to be a question for the jury.

And, although the court on a full consideration of all of the evidence in the case might reach a conclusion different from that reached by the jury, yet such fact does not warrant the court in setting aside the verdict of the jury unless such verdict is manifestly against the weight of the testimony.

In the case of the City of Chicago Railway Company vs Bohnow, 108 Illinois Appellate 346 page 352 the Court said:

> "As an appellate tribunal, what is our duty in the premises? Will it do for us to say that if the case had been left to us in the first instance we would decide it the other way, and therefore, we must reverse the action of the lower court? That question must be answered under the guidance of the decision of our Supreme Court. In a common law action, under our constitution, la ws and practice, the jury is called in from the body of the people to assist in the trial. To these jurors are submitted all questions of fact. They see and hear the witnesses and upon them is placed the responsibility of passing upon the credibility of the witnesses and of determining upon which side is the greater weight of the testimony. Lowry vs Orr, 1 Film. 83, it is said: Where there is a contraiety of evidence on

in setting these tracks.

It seems to be the rule in this state that a person crossing railroad tracks must exercise the same kind of care commensurable with the knowledge of danger. [illegible] presently va. Baltimore and Ohio R. R. Co. 230 Ill. 487.

The evidence discloses that he was crossing between ten and fifteen miles per hour as he approached the crossing, that he was looking for the road that turned to the left. Under all the circumstances we think it is a question of fact for the jury to decide whether the defendant was guilty of any contributory negligence in driving the car in the manner he did as he approached this scene of what afterward proved to be the accident.

There is a very sharp conflict between the testimony of witnesses for the appellee and of the witnesses for the appellant and in such cases the courts of this state have almost uniformly held the question of negligence and for sure and caution to be a question for the jury.

And, although the court on a full consideration of all of the evidence in the case might reach a conclusion different from that reached by the jury, yet such fact does not warrant the court in setting aside the verdict of the jury unless such verdict is manifestly against the weight of the testimony.

In the case of the City of Chicago v. Mahoney, 208 Illinois Appellate 341 [illegible] the court said:

> "In an appellate tribunal," says [illegible] the trial, it is for us to say whether if the case had been left to us in the first instance we would decide it the other way," and [illegible] we must refrain from setting aside the verdict [illegible] the jury unless such verdict is manifestly against the weight of the testimony. [illegible] the jury [illegible] the credibility of the witnesses, [illegible] the weight to be given to the testimony, [illegible] the verdict [illegible] the trial. [illegible] the jury [illegible] all questions of fact. [illegible] the testimony. [illegible] C., 1. C. R. R. Co., 12 Ill. [illegible]

> both sides, and the facts and circumstances, by a fair and reasonable intendment will warrant the inference of the jury, courts will reluctantly, if ever, disturb their verdict, notwithstanding it may appear to be against the strength and weight of the testimony. So, where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge of that credibility and to attach such weight to the testimony of each as may seem to be proper, after a due consideration of all of the circumstances arising in the particular case."

To the same effect are the cases of Tolman vs Race 36 Illinois 477 and Halty vs Markel 44 Illinois 227.

In Illinois Central Railway Company vs. Gillis 68 Illinois 317 page 319 the court said:

> "If any rule of this court can be so well established as to be neither questioned or requiring citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict notwithstanding it may appear to be against the strength and weight of the testimony" Calvert vs Carpenter 96 Illinois 67; Shevalier vs Seager 121 Illinois 569; Bradley vs Palmer 193 Illinois 88; Lourance vs Goodwin 170 Illinois 393.

In view of this well established rule and the conflict of the evidence in this case, the verdict of the jury should not be disturbed.

It is urged by the appellant that there is a variance between the allegations of the declaration and the proof. This contention is predicated upon the assumption that the automobile struck the locomotive rather than the locomotive struck the automobile. Again this is a question of fact, which, as herein shown, is a question for the jury.

Some objection has been urged that the court erred in refusing certain instructions tendered on behalf of the appellant. The jury were fully and amply instructed as to the law applicable to this case and there was no prejudicial error in refusing the instructions complained of.

Objection is also urged as to the admission and rejection of evidence. The matters are unimportant and no material error in the acts of the trial court is shown.

In view of the conflict of the evidence the court did not err in refusing to direct a verdict for the defendant

to the jury, counsel will refrain, if any, from
to be against the strength and weight of the evidence.
ed, where the verdict depends upon the credibility of
the witnesses, it is the peculiar province of the jury
to judge of that credibility, and to attach such weight
to the testimony of each as they deem to be proper, after
a due consideration of all of the circumstances adduced
in the particular case."

To the same effect are the cases of Folsom vs. Dove 30 Illinois
497 and Duffy vs. Burtel 44 Illinois 497.

In Illinois Central Railway Company vs. Cobb 31 Illinois
317 page 319 the Court said:

"If any rule of this sort can be so well established
as to be neither questioned or doubting objects of
authorities to support it, it is that a verdict will
not be set aside wherever there is a conformity of
evidence, and the facts and circumstances, by a fair
and reasonable intendment, will authorize the verdict
notwithstanding it may appear to be against the strength
and weight of the testimony." Harvey vs. Commercial Ins.
Illinois 57; Overshire vs. Dwyer 121 Illinois 409;
Crowley vs. Palmer 125 Illinois 96; Courtney vs. Dowling
170 Illinois 283.

In view of this well established rule that the decision of
the evidence in this case, the verdict of the jury should not be
disturbed.

It is urged by the appellant that there is a variance
between the allegations of the declaration and the proof. This
contention is predicated upon the assertion that the automobile
struck the locomotive rather than the locomotive struck the
automobile. Upon this is a question of fact, which, as shown,
shown, is a question for the jury.

Some objection has been urged that the Court erred in
refusing certain instructions tendered to modify or the appellant.
The jury were fully and properly instructed ... the liti-
gable to this case and there was no prejudicial ...
the instructions complained.

Objection is also urged to the admission of certain evidence. The evidence ...
tion of evidence. ...
error in the case of ...

In view of the evidence ...
not err in refusing to ...

(appellant) and correctly submitted the questions of negligence and contributory negligence to the jury. The judgment should be and is hereby affirmed,

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 618⁴

BE IT REMEMBERED, that afterwards, to-wit: On FEB 18 [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1931

Owen Anderson, Administrator of
the Estate of Anton Kasprzak,
Deceased,

appellee,

vs.

Chicago, Rock Island & Pacific
Railway Company, a Railroad
Corporation,

appellant,

Appeal from Circuit Court of
La Salle County.

WOLFE, J:

Owen Anderson, Administrator of the Estate of Anton Kasprzak, deceased, filed a suit in the Circuit Court of La Salle County, Illinois, to recover damages for the death of said Anton Kasprzak, alleged to have resulted from the negligence of the appellant in the operation of its passenger train in the City of La Salle, Illinois. The accident occurred February 21, 1923.

The original declaration consisted of four counts. A plea of the general issue was filed. On the first trial, the court directed a verdict for the defendant as to the first, third and fourth counts, and the case went to the jury on the second count. A verdict of $5000.00 was rendered in favor of the plaintiff, on which judgment was entered. Thereafter, the judgment was reversed and the cause remanded by this court.

After the cause was redocketed in the Circuit Court, plaintiff filed three additional counts, to which a plea of the statute of limitations was sustained. Thereafter, on

In the Supreme Court of Illinois

Second District

October Term, A. D. 1923

Owen Anderson, Administrator of
the Estate of Anton Kasprzak,
Deceased,

Appellee,

vs.

Chicago, Rock Island & Pacific
Railway Company, a Railroad
Corporation,

Appellant,

Appeal from Circuit Court of
La Salle County.

HOLT, J:

Owen Anderson, Administrator of the Estate of Anton Kasprzak, deceased, filed a suit in the Circuit Court of La Salle County, Illinois, to recover damages for the death of said Anton Kasprzak, alleged to have resulted from the negligence of the appellant in the operation of its passenger train in the City of La Salle, Illinois. The accident occurred February 21, 1923.

The original declaration consisted of four counts. A plea of the general issue was filed. On the first trial, the court directed a verdict for the defendant as to the first, third and fourth counts, and the case went to the jury on the second count. A verdict of $5000.00 was returned in favor of the plaintiff, on which judgment was entered. Thereafter, the judgment was reversed and the cause remanded by this court. After the cause was reinstated in the Circuit Court, plaintiff filed three additional counts, to which a plea of the statute of limitations was entered. Thereafter, on

November 22, 1930, plaintiff filed another additional count, to which the defendant pleaded the general issue and the statute of limitations. A demurrer was sustained to the plea of the statute of limitations. On this trial, plaintiff dismissed the first, third and fourth counts, and the case went to the jury on the second count of the original declaration and the additional count filed on November 22, 1930.

The second count after alleging that the defendant operated "both passenger, express and freight trains", averred: "The plaintiff's intestate was passing along and upon a certain public highway in the City of La Salle known as Creve Coeur Street and over and upon the crossing of said street and over said railroad tracks, the same being then and there a public traveled street and crossing within the city limits of the City of La Salle, in said county, he then and there being in the exercise of due and ordinary care for his own safety, when through the wanton, wilful misconduct and gross negligence of the defendant company by its agents, a certain locomotive engine and train of passenger cars known as the Golden State Limited was driven through said City of La Salle and upon and over said crossing in a careless, dangerous, wanton and reckless manner, and at a high and excessive rate of speed, wholly regardless of the lives of persons who were apt to be then upon said crossing; by means whereof the plaintiff's intestate, who was then and there passing over and upon said crossing in the night time, to-wit; 10 o'clock P.M., was run against, E etc.

The additional count filed on November 22, 1930, and to which a plea of the statute of limitations was held bad, alleged "that on February 21, 1923, plaintiff's intestate, being

in the exercise of due care for his own safety, while crossing the tracks of the defendant at the Creve Coeur street crossing, by reason of a certain hole in said street, or the crossing thereof, which existed there without fault upon the part of the defendant, he, the plaintiff's intestate, caught his foot in said hole in said crossing of said street and in some manner unknown to the plaintiff stumbled and fell, and was prevented from promptly removing hiſself from said crossing and from upon the tracks of said railroad company by reason of the certain hole in said cross-walk of said street, which it was the duty of said City of La Salle to have kept in repair, and which it was no part of the duty of the said defendant company to keep in repair; and that while the plaintiff's intestate was in such situation and so circumstanced, and incapacitated from promptly removing himself from said crossing or cross-walk, for the reasons aforesaid, the defendant company by its agents and employees in charge of its trains without knowing of the inability of plaintiff's intestate to remove from said cross-walk and of the means which prevented him from removing himself from such situation as aforesaid while operating one of its passenger trains and engines in a westerly direction towards and upon said crossing, wantonly and willfully ran the same at an excessive rate of speed, to-wit, 40 miles per hour, knowing that persons might at any time be upon said cross-walk, by reason of which wanton and willful operating of said train at an excessive rate of speed, the same struck the plaintiff's intestate, etc. "

The jury returned a verdict assessing plaintiff's damages at $3200.00. A motion to set aside the verdict and for a new trial and a motion in arrest of judgment were both overruled.

Judgment was entered upon the verdict. This case is before this court on appeal from such judgment.

It will be noted that from the statement of facts that the defendant filed a plea of the statute of limitations to the additional count of plaintiff's declaration. It is now urged by the appellants that the trial court erred in sustaining the demurrer to said plea. It is insisted by the defendant that the additional count of the declaration set up a new cause of action. This suit was brought originally to the January Term of the Circuit Court of La Salle County in 1924. The additional count was not filed until November 22, 1930. In the original declaration, there is no count that charges that there was a hole in the sidewalk of any kind or character at the crossing; or that it's condition had anything to do with the death of the decedent.

On the first trial of this case, the appellee over the objection of the appellant, offered proof that there was a hole in the sidewalk at the crossing where the accident occurred, and that the next day thereafter, the defendant railroad company repaired the walk. In deciding whether this proof was competent under the former declaration, this Court in Vol. 243, App. P-337 say "The Court, over the objection of appellant, admitted evidence that some of the planks on the board walk on the west side of Creve Coeur Street were rotten and had holes in them, and that on the morning following the accident the servants of appellant tore up the old planks and put in new ones. It is insisted by appellee that the evidence as to the defective condition of the sidewalk was admitted merely for the purpose of showing surrounding conditions and circumstances, and that where evidence is competent for one purpose, though incompetent for another, it is nevertheless admissible; that it has been held competent to prove the condition of a sidewalk

judgment was entered upon the verdict. This case is before this court on appeal from such judgment.

It will be noted that from the statement of facts that the defendant filed a plea of the statute of limitations to the additional count of plaintiff's declaration. It is upon urged by the appellants that the trial court erred in sustaining the demurrer to said plea. It is insisted by the defendant that the additional count of the declaration set up a new cause of action. This suit was brought originally to the January term of the Circuit Court of La Salle County in 1924. The additional count was not filed until November 22, 1930. In the original declaration, there is no count that charges that there was a hole in the sidewalk or any kind or character at the crossing; or that it's condition had anything to do with the death of the deceased.

On the first trial of this case, the appellee over the objection of the appellant, offered proof that there was a hole in the sidewalk at the crossing where the accident occurred, and that the next day thereafter, the defendant railroad company repaired the walk. In deciding whether this proof was competent under the former declaration, this Court in Vol. 242, Page 532 says "The Court, over the objection of appellant, admitted evidence that some of the planks on the board walk on the west side of Lake Shore Street were rotten and holes in them, and that on the morning following the accident the same or appellant here or the old lumber and put in new ones. It is insisted by appellee that evidence as to the defective condition of the sidewalk was admissible under the purpose of showing subsequent condition was [illegible], and that where evidence is competent for one purpose, though incompetent for another, it is nevertheless admissible; that it

a few days after the accident and also that the sidewalk was repaired some days after the accident, to establish the conditions of the sidewalk at the time of the accident. The declaration did not allege that the sidewalk, or its defective condition, had anything to do with the accident. A pleading is intended to disclose a cause of action or defense, and a party has a right to know what he is charged with so as to enable him to properly make out a case and to prevent his being taken by surprise by the evidence at the trial. It is apparent from this argument that the evidence was offered not for the purpose of showing the surrounding conditions, but for the purpose of establishing appellee's right to recover. If he decided to recover on the ground that the sidewalk was defective, and that deceased caught his foot therein, he should have so declared in his declaration. Without such an allegation, the proof was not admissible and constituted not only reversible error, but it also constituted a variance between the declaration and the proof."

The language used in the former case clearly indicates that proof had been offered of a different cause of action than that set forth in the declaration. Carlin vs. City of Chicago, reported in the 262 Ill. Page 2 572 where the same question was before our Supreme Court, the Court lays down one of the tests of whether a declaration states a new cause of action as follows; "One test by which it is determined whether the different counts are for the same or different causes of action, is whether the same evidence would support a judgment rendered upon either. This does not mean that the evidence must be admissible, indifferently, under both counts if it was objected to on the ground of a variance. The question under this test is, would the same evidence unobjected to, sustain the substantial averments of both counts." Testing the additional count of this declaration by this rule, we are of the opinion that the additional count set forth a new cause of action, and the court erred in sustaining a demurrer to the plea of the statute of limitation.

There is a question as to whether the second count of the declaration as submitted to the jury, charged willful and wanton conduct on the part of the defendant. The count avers, among other things, that the intestate was in the exercise of due and ordinary care for his own safety at the time of the accident, and then undertakes to charge wanton and willful conduct of the defendant in the handling of its trains. We are of the opinion that notwithstanding the language of the pleader where it appears to have been the intention of the appellee to make this a wanton and willful count, still it was incumbent upon the appellee to prove by a preponderance of the evidence under the second count that the deceased was in the exercise of due care and caution for his own safety.

From an examination of the record, it appears to us that the proof shows a failure of plaintiff's intestate to exercise due care on his part and also shows that the negligence, if any of the appellants, was not the proximate cause of the injury and death.

The evidence shows that the decedent was a man of no infirmities either of eye-sight or hearing, nor did he have any physical disabilities. He had lived in the vicinity of this crossing for a number of years and was well acquainted with the operation of these trains over these tracks at this particular crossing. There is little conflict, if any, in the evidence that shows that the engineer blew the whistle at the whistling post one mile east of the station, and that the whistle was blown at a point, one-quarter of a mile east of the depot station; that when the engine was about at the depot and at the time the train reached the crossing, the bell was ringing, the headlights were burning and the crossing gates were down.

It is our opinion that if the second count of the declaration is treated as a 'wanton and willful' count, that the evidence wholly fails to show any wanton and willful conduct of the defendant in

the operation of the train that killed the decedent, and if treated as a negligent count, then the plaintiff has failed to prove that plaintiff's intestate was in the exercise of ordinary care for his own safety at the time of the accident.

There is no competent proof in the record that the foot of the deceased was caught in the hole of the sidewalk. That the deceased's foot was caught in the hole in the sidewalk can only be surmised or conjectured from the evidence in the case. The language used in our former opinion of this case, on Page 341, we think is very applicable to this question in this case "No one saw him at the crossing, near it, going towards it, or in its vicinity." There were no blood stains on the crossing, and no evidence that the body had been struck or dragged. He may have been east of the crossing or west of the crossing, or on it for all the evidence shows. His position at the time he was struck could have been established upon circumstantial evidence, but where circumstantial evidence is used to show a material fact, the proof must be based on something more than mere guess, conjecture or surmise. A theory cannot be set out and established by circumstantial evidence unless the facts relied on are of such a nature and are so related to each other that it is the only conclusion that can reasonably be drawn therefrom. If there was evidence in the record to prove that the foot of the deceased was caught in a hole in the sidewalk as contended for by the appellee, and that he was unable to remove it himself from the path of the approaching train, then the defective sidewalk was the cause of the injury and death, and it is not contended in this case that it was the duty of the railroad to repair or build a sidewalk."

We are convinced, even though the additional count should be regarded as good, yet there could not be a recovery unless the appellee shows wanton and willful conduct of the defendant. After a careful examination of this record, we are unable to say that the evidence is such that it can be said that the appellant

was guilty of any willful or wanton conduct that caused the injury and death of the plaintiff's intestate.

The judgment of the Circuit Court of La Salle County, is hereby reversed and the cause remanded.

was guilty of any willful or wanton conduct that caused the injury and death of the plaintiff's intestate.

The judgment of the circuit court of Lincoln County is hereby reversed and the cause remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 619

BE IT REMEMBERED, that afterwards, to-wit: On FEB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8387 Ag. No. 11

In the Appellate Court of Illinois

Second District

October Term, A.D. 1931

The People of the State
of Illinois
Defendant in error,
vs.
Leonard Piazza
Plaintiff in error,

Error to County Court of
Winnebago County

WOLFE, J:

The State's Attorney of Winnebago County filed an information in the County Court of said county, charging that the defendant, Leonard Piazza, "did then and there unlawfully and wilfully carry concealed on and about his person a certain automatic pistol, etc." Trial was had before a jury which found him guilty. A motion for a new trial and arrest of judgment were overruled by the court. The defendant was sentenced to serve six months at the State Farm at Vandalia and to pay the costs of the proceeding. The case is brought to this court on a writ of error.

The evidence shows that the defendant and two companions were riding in an automobile in the City of Rockford, Illinois. A police officer was looking for some parties that answered the description of one of the occupants of the car and saw the young man sitting in the car while it was parked near the curb on a public street in said city. The officer testified that he went up to speak to one of these young men, and as he did so the defendant made a motion as if to get something out of the side of the car. The officer immediately drew his revolver and commanded the defendant to get out of the car. The officer called the police patrol and sent the defendant to the police station. After the

Gen. No. 5887

No. No. 11

In the Appellate Court of Illinois

Second District

October Term, A. D. 1921

The People of the State
of Illinois

Defendant in error,

vs.

Leonard Ziarsa

Plaintiff in error,

Error to Circuit Court of
Winnebago County

MR. JUSTICE DUNN delivered the opinion of the court.

The plaintiff in error, hereinafter referred to as the defendant, Leonard Ziarsa, was found guilty by a jury in the Circuit Court of Winnebago county of the crime of burglary, fixing the punishment at confinement in the penitentiary for a term of one year. A motion for a new trial and arrest of judgment were overruled by the court. The defendant was sentenced to serve the term fixed by the jury in the penitentiary at Joliet, Illinois. He has sued out this writ of error to obtain a reversal of the judgment and sentence.

The evidence shows that the defendant and two companions were riding in an automobile in the city of Rockford, Illinois. A police officer saw them pass by and took down the number of the automobile. The officer then proceeded to the garage where the car was kept and upon arriving there saw the defendant and his companions in the car. The officer immediately drove his car in front of the automobile in which the defendant and his companions were riding and compelled them to stop. The officer then arrested the defendant and his companions and took them to the police station. After the

defendant entered the police car, the officer looked inside the car in which the defendant had been sitting and found in the right hand pocket of the car, near where the defendant was sitting, a .25 caliber, automatic pistol, loaded. It is admitted by the defendant that the pistol in question was owned by him.

It is first urged by the plaintiff in error that the court improperly admitted the pistol in evidence, because when the officer searched the car he had no search warrant. It is now contended by the plaintiff in error that this was in violation of his constitutional rights. If the plaintiff in error wished to properly raise this question he should have made a motion prior to the time of the trial to suppress the evidence. The record in this case shows that he failed to do so. He is not now in a position to raise this question. People vs. Brocamp, 307 Ill. 448.

It is next urged that under the law and facts in this case, he cannot be convicted for carrying a concealed weapon on or about his person. It is claimed that the pistol in question was not found on or about the person of the defendant. The People claim that it was in such close proximity to the defendant that it could readily be made available if he wished to use it, and it was out of sight of the public. We think that under the law this weapon was concealed and was close enough to him to be readily accessible for immediate use if desired and under the law that is the meaning of carrying a concealed weapon on or about the person. People vs. Niemoth, 322 Ill. 51.

It is next insisted that the plaintiff in error was not convicted by a legal jury. It is his contention that the jury consisted of seven men and five women, and he so states in his argument. The record nowhere discloses that the jury consisted of women and men, except in giving their names. The plaintiff in error accepted these jurors without any objection, and submitted

his case to them at the time of the trial. There was no challenge to the array, nor any claim of any irregularity called to the attention of the trial court, either before or after the trial of the case. We are of the opinion that the plaintiff in error is not in a position to urge this question for the first time in this court as a cause for reversal. (People vs. McNeal, 346 Ill. 329).

At the time of the trial, the plaintiff in error was a witness in his own behalf and on direct examination his counsel asked him the following question: "Have you ever been arrested or convicted of any crime?" On objection of the State's Attorney the court refused to allow the defendant to answer the question, and it is now urged that this is error, as the plaintiff in error should have been permitted to offer evidence of his good character. He cites the case of Jupitz vs. The People, 346 Ill. 516, as sustaining this contention. No doubt in a criminal case the defendant is permitted to offer evidence of reputation of good character but we are of the opinion that the court properly sustained the objection to this question, as this is not the ordinary and proper way to prove the reputation of good character of the defendant.

We find no reversible error in this case and the judgment of the Circuit Court is hereby affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 619

BE IT REMEMBERED, that afterwards, to-wit: On MAR 15 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District.

October Term, A.D. 1931

National Contract Purchase
Corporation, a Corporation,

Appellee,

vs.

Glen Building Corporation,
a corporation,

Appellant,

Appeal from County Court of
Du Page County

WOLFE, J:

The appellant, the Glen Building Corporation, a corporation, recovered a judgment in the County Court of Du Page County, Illinois, against Edward D. McLaughlin and John Michalopoulas, who were at that time and for several years prior thereto had been operating a moving picture theater at Glen Ellyn, in a building owned by the appellant. An execution was issued upon this judgment and delivered to the sheriff of said county, who, on the 27th day of April, 1931, levied the same upon the personal property which is the subject matter of this suit.

The National Contract Purchase Corporation, the appellee herein, served notice upon the sheriff that it was the owner of all the chattels in question; the same being enumerated in a certain chattel mortgage held by them, recorded in Du Page County, in Book 48 of Mortgages, on page 505, and all the said chattels situated in the premises at 540 Crescent Boulevard in the village of Glen Ellyn, which premises are known as the Glen or Glen Ellyn Theater. The notice further stated, "You are further hereby notified that Edward D. McLaughlin and John Michalopoulas have no right, title or interest whatsoever in said equipment, the said right, title and interest of Edward D. McLaughlin and John Michalopoulas having ceased and determined by the foreclosure

In the Appellate Court of Illinois.

Second Division.

October Term, A.D. 1921

National Contract Purchase
Corporation, a Corporation,

Appellee,

vs.

Glen Building Corporation,
a corporation,

Appellant,

BOLES, J:

The appellant, the Glen Building Corporation, a corporation, recovered a judgment in the County Court of De Kalb County, Illinois, against Edward D. Hodgedon and John Hodgedonjune, who were at that time and for several years prior thereto had been operating a moving picture theater at Glen Ellyn, in a building owned by the appellant. An execution was issued upon this judgment and delivered to the sheriff of said county, who, on the 27th day of April, 1921, levied the same upon personal property which is the subject matter of this suit.

The National Contract Purchase Corporation, the appellee herein, served notice upon the sheriff that it was the owner of all the chattels in question; the same had been purchased by certain chattel mortgage held by them, executed in DuPage County, in Book 43 of Mortgages, on page 326, and all the said chattels situated in the premises at 340 Crescent Boulevard in the village of Glen Ellyn, which premises are known as the Glen or Glen Ellyn Theater. The motion further stated, that one Frederick Hasley Hodgedon had title or interest in said property. The said right, title and interest of Edward D. Hodgedon and John Hodgedon

of said chattel mortgage on, to-wit, "the 28th day of July, 1930, and the undersigned will hold you liable for any sale or attempt to sell, or to remove or attempt to remove the said chattel property."

The sheriff in turn notified the County Judge of the claim of the appellee. The court thereupon directed the clerk to docket the case and to notify the appellants that the trial of the same would occur on the first day of June, A. D. 1931. The hearing was had before the court without a jury. The appellee to sustain its contention called three witnesses. The appellants called no witnesses and offered no proof.

The first witness called by the appellee, H.A.R. Dutton, president of the appellee corporation, identified the chattel mortgage under which his company claimed title to the chattels in question, and also identified the signatures of Mr. McLaughlin and Mr. Michalopoulas to the mortgage. Over the objection of the appellants the mortgage was introduced in evidence. The witness further testified that on the 24th day of July, 1930, they took possession of the chattels described in the mortgage. They put a man by the name of Thomas Gary in custody of the property as custodian of the same. The witness testified relative to a conversation which he had with Michalopoulas after taking possession of the property, of the arrangement they had made with a truck-driver who came out of Chicago, to remove the chattels from the theater; that some of the property was removed and placed in the truck when the police interfered and stopped them.

The appellee offered in evidence a copy of a bill for an injunction filed by the mortgagors McLaughlin and Michalopoulas which recited that they, the mortgagors did not receive from appellee the sum of money which the chattel mortgage recites that they had received; that the mortgagors did not owe the appellee any money whatsoever; that the whole transaction was usurious and void; and the prayer of the bill for an accounting and injunction

to prevent the appellee from selling or removing the chattel property. The appellee also offered in evidence a copy of the writ of injunction served upon the appellee on the 28th day of July, 1930, enjoining the appellee from removing from the theater and proceeding with the sale of any of the chattel property described in the chattel mortgage.

William Michalopoulas was called as a witness and told of his conversation with Mr. Dutton, and also as to the management of the theater after the appellee had foreclosed his mortgage. At the conclusion of the evidence the court entered an order finding that the appellee was the owner and held title to the property in controversy. The description of the chattels as contained in the order is the same description as that set forth in the chattel mortgage. The appellant prayed for an appeal to this court, which is allowed.

At the time the chattel mortgage was offered in evidence the appellants objected to it as being incompetent, because the chattel mortgage was neither acknowledged nor recorded in the county where the mortgagors resided, the same being void as to third persons. It seems to be accepted by both parties to this suit that if the appellee took possession of the property in question under its chattel mortgage and retained possession of same before the sheriff made his levy under the execution on the judgment of the appellant, then the question of the validity of the mortgage is not involved in this suit, as the mortgagee had reduced the chattels to its possession before the rights of the third parties intervened and its title is good against all persons even though the mortgage may have been improperly acknowledged or recorded. Garr-Scott vs. Hurd, 92 Ill. 315; Chipron vs. Feikert, 68 Ill. 284. We think under the circumstances in this case the court properly admitted the chattel mortgage in evidence.

It is strenuously insisted by the appellant that the appellee did not take possession of the chattels under their

mortgage in such manner as to bar the rights of third parties, and even if it did take such possession it abandoned the same and were not in possession of the chattels at the time the execution was levied by the sheriff. In our opinion there is no merit in this contention. The evidence clearly establishes the fact that the appellee took possession of this property on the 27th of July, 1930. The record shows that on the next day the appellee was served with a writ of injunction restraining it from removing the property from the theater and proceeding with the sale of any of the chattel property in question. If the custody of the property had not been taken from the mortgagors surely it would have been a useless thing to file an injunction suit against the appellee to restrain it from disposing of the property.

It is next insisted that the appellee lost possession of the property and therefore, the execution of appellant's claim is superior to that of the appellee. The record shows that after the injunction had been served upon the appellee, arrangements were made with one William Mitchel to take charge of the theater. Mr. Dutton testified, "Our custodian was out there during all that time."

In our opinion the evidence shows that the appellee took possession of this property and held possession until the time that the property was removed by the sheriff under his execution.

The appellant also contends that the appellee did not properly identify that property in question as being the property described in its chattel mortgage. The court heard the evidence and decided this question adversely to the appellant, and we think from an examination of the record it discloses that there can be no question about the identification of the property.

Appellee insists that any rights which the appellant has in the chattel property, accrued to it, after the mortgagors in the original chattel mortgage had filed their suit in the circuit

court, restraining the appellee from selling or disposing of this property. Therefore, the doctrine of lis pendens applies to the appellant's right to acquire any interest in said property, and such interest is not superior to the rights of the appellee. Appellant denies that the doctrine of lis pendens applies to the facts in this case. In the case of Moore v. Zelic, 338 Ill. 583, at page 589, the court in their opinion say: "Lis pendens means a pending suit." Under the common law, while a suit was pending nothing in relation to the subject thereof could be changed, and one acquiring from a party to the proceeding an interest in the property involved in the litigation, where the court has jurisdiction of the subject matter and of the person of the one from whom the interest is acquired, takes such interest subject to the rights of the parties to the litigation as finally determined, and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset." "The doctrine of lis pendens is based on questions of public policy and convenience as necessary to the administration of justice and of full effect and that an end be had to litigation." Kemper v. Webber, 318 Ill. 494.

The appellant, however, insists that the ultimate object of the injunction suit was not the disposal of the chattels, but was to decide whether the mortgagors in the chattel mortgage were indebted to the appellee. The bill for injunction states that the appellee had taken possession of the chattels in question and were threatening to sell the same under the power conferred by the chattel mortgage. It seems to us that the court would necessarily have to pass upon the appellee's rights to the possession of this property in that suit. The record does not disclose whether the injunction suit had been decided at the time the sheriff levied the execution on the chattel property, but both appellant and appellee in their printed arguments refer to it as being undecided at the time of the hearing on the rights

of property in the county court. The doctrine of lis pendens applies to personal property and in a proper case it can be invoked the same as against real property. McCaulley v. Rodgers, 104 Ill. 582; Reid v. Sheffey, 75 Ill. 142. It is our opinion that the doctrine of lis pendens should be applied to the facts in this case.

The trial court in its order found that the National Contract Purchasing Corporation "is the owner and holds title to the following described chattels", then describes the chattels. The order does not state the reasons for the court holding that the appellee is the owner of the property. As we have stated in this opinion, we think the evidence shows that the appellee took and held possession of the property under its chattel mortgage, therefore as against the appellants, it is the lawful owner of the property.

The appellant insists that this order is erroneous. It argues that in a judgment where the doctrine of lis pendens is applied the order should not have found the ownership of the property in the appellee, but should have found that the appellant held its title subject to any interest that might ultimately be established in the parties as the result of the litigation in the injunction suit. If the court had based its opinion on the lis pendens doctrine, then the judgment should have been as contended for by the appellants, but there was sufficient evidence in the record for the court to base its judgment on the actual possession and ownership of the property by the appellee.

We find no reversible error in the case and the judgment of the county court of Du Page County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 619[3]

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 15 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8468 Ag. No. 50

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1931

Lee Stapleton,

Appellee

vs. Appeal from the Circuit Court

Erma Dewey, of Peoria County.

Appellant.

WOLFE, J:

The appellee was riding as a guest in the automobile of S. L. Johnson when his car collided with the automobile driven by Erma Dewey, the appellant. The appellee Stapleton filed suit in the Circuit Court of Peoria County alleging that she has sustained injuries as a result of this collision which were caused by the negligence of both Johnson and Mrs. Dewey. The case was heard in said court before a jury, and after the evidence of the plaintiff had been introduced the plaintiff dismissed the suit as to the defendant S. L. Johnson. Johnson was called as a witness in behalf of the plaintiff and gave his version of the accident. The jury found the issue in favor of the plaintiff and assessed her damages at $3,000.00. The case comes to this Court on appeal.

The accident happened in the City of Peoria at the intersection of Hamilton and Monroe Streets. The car in which the appellee was riding was being driven in a northerly direction upon Monroe Street and the one driven by the appellant in a westerly direction on Hamilton Street. Hamilton street, at the point of the collision is a part of the hard-road system of Illinois, and by a city ordinance of Peoria is designated as a boulevard, or through street. On the east side of Monroe Street, about 18 feet south of the intersection with Hamilton Street, there is a stop sign. The evidence shows that from this stop sign, you could look to the east, the direction from

Gen. No. 8425 Ct. Rm. 20

IN THE
SUPERIOR COURT OF ILLINOIS
COUNTY OF COOK

October Term, A.D. 1907

Lee Stanley,

Appellee

vs. Appeal from the Circuit Court

Erne Dewey, of Peoria County.

Appellant.

HOLT, J:

The defendant was riding on a grant in the automobile of C. L. Johnson when his car collided with the automobile driven by Dewey, the appellant. The appellee therefore filed suit in the Circuit Court of Peoria County claiming that the defendant injuries as a result of this collision that he sustained injuries to both lungs and eye. Dewey. The case went to trial resulting in a jury, and after the evidence of all plaintiff had been introduced the plaintiff dismissed his suit as to C. Johnson. Johnson was called as a witness in behalf of the plaintiff and gave the version of the accident. The jury found the issue in favor of the plaintiff and assessed damages at $3,000.00. The case comes to this court on appeal.

The accident happened in the city of Peoria at the intersection of Hamilton and Wayne Streets. The car in which the appellee was riding was being driven in a southerly direction down Wayne Street and the one driven by the defendant in a westerly direction on Hamilton Street. Hamilton street, at the point of the collision is a part of the hard-road system of Illinois, and is a fully paved of Peoria is described as a boulevard, or five-lane street. On the east side of Wayne Street, there is a park with a fish pond in it. The intersection with Hamilton Street, there is a stop sign. The evidence shows that from this stop sign, you could look to the west, the direction from

which the appellant's car was approaching, and see down the street a distance of approximately one block, the view being free and open at the intersection. The car in which the appellee was riding, was a 1925 model Stutz sedan, weighing about two tons. The car the appellant was driving, was a Moon sedan of much lighter weight. The collision occurred at the north part of the intersection. The Stutz sedan apparently was struck at the right rear end by the left front end of the Moon sedan. The Moon sedan was only slightly injured, and was driven away by the appellant shortly after the accident.

The appellee is a single girl, 23 years of age, and had been working as a waitress at a confectionery store. Johnson was a married man, who also worked at the same confectionery store. The appellee had asked her employer to get away early on the night of the accident, and Johnson was taking her home in his car. The evidence shows that in doing so he would have to go 34 blocks out of the way from the direct road to his home. Appellee and Johnson were well acquainted with the intersection in question; each knew that Hamilton Boulevard was a through street. They claim that their car came to a complete stop at the stop sign; that each looked in an easterly direction and saw no car and proceeded out into the intersection at a rate of speed which in their opinion, did not exceed 12 or 14 miles per hour. The appellee said she was sitting looking straight ahead as they drove into the intersection and that the front wheels of the car in which she was riding had passed the north curb line on Hamilton Boulevard when she first saw appellant's car approaching. Johnson, in his testimony, substantially corroborates the testimony of the appellee.

Mrs. Dewey, the appellant, testified she approached the intersection at 15 miles per hour with her front lights burning and her brakes working in good condition; that she was traveling westward on the right hand side of the Hamilton Boulevard with her left wheel south of the northern rail of the street car track in Hamilton Street. She testifies to the slight damage that was done to her car. There was no damage to the headlights, radiator or tires, nor did the

appellant receive any injuries and was not dislodged from her seat in the car by the collision. A cab driver by the name of LaVoe was traveling in the same direction as the appellant and a short distrance back of her just before the collision, and he corroborates the appellant in her testimony as to where she was driving, and the rate of speed she was traveling. LaVoe testified that a car coming from the south, made a turn to miss the appellant, and as the car swung around back into Monroe Street, it was hit by the appellant's car and the car turned over; that in his opinion the car of Johnson, as it came from the south and entered the intersection of Monroe and Hamilton Streets was traveling at the rate of 35 miles per hour. This is in substance the evidence given by the respective parties relative to the accident and the appellant very earnestly contends that the evidence in this case is not sufficient on which a jury would be justified in finding that the appellant was guilty of negligence or that her negligence was the approximate cause of the injury to the defendant.

This case was submitted to the jury for their consideration and there is no criticism in regard to the instructions that were given by the trial judge to the jury as being the law applicable to the case. Unless this court can say that the verdict is manifestly against the weight of the evidence, we would not be justified in setting the verdict of the jury aside or reversing the judgment. The reading of the evidence in this case discloses a very sharp conflict relative to the cause of this accident. This issue of fact was in the province of the jury to decide. They saw and heard the witnesses and we would not feel justified in setting aside their verdict under the circumstances in this case as being contrary to the weight of the evidence.

There is some objection to the admissibility of evidence and the refusal to permit the appellant to cross-examine the appellee; but, we are of the opinion that the Court did not err in these matters. Complaint is also made that the appellee was guilty of negligence which contributed to the injury, and therefore, should not recover. This

was also a question of fact for the jury to decide, and we do not feel justified in saying that they are not correct relative to this matter.

The appellant charges the appellee and Johnson with collusion in attempting to mulct the appellant in damages. The jury had a better opportunity to observe the conduct of the parties than this court, and while there are some circumstances that might tend to sustain the charge of the appellant, it is for the jury to say by their verdict who was right in relation to the issues in this case. This issue, they also found in favor of the appellee.

After the collision, it was discovered that the appellee had a cut on her leg just above the knee, which was bleeding very profusely. She was taken to the hospital and the wound was sewed up and given what appeared to be proper medical treatment. She went home the next morning. This accident happened on April 23, 1930. The doctors testified as to further treatment of this wound; that it caused her pain and became infected. The evidence shows that on November 26, 1930, she went back to work as a waitress at the Sugar Bowl, the same place that she worked before and at the same wage that she was receiving prior to the time that she was injured; that she had been working regularly until May 20, 1931, and day of the trail of the case. The evidence did not show what wage the appellee is receiving.

The appellant contends that the amount of the verdict of $3000.00 is grossly excessive. That during this time the appellant worked several weeks as a waitress and spent one month in the City of Chicago; that there is no evidence of any loss of wages, because there was no proof of the wages that appellee was receiving at the time of the injury. We are of the opinion that the amount of this verdict is excessive and should not have been more than $2000.00. It is, therefore, ordered that the appellee file with the Clerk of this court within thirty days from the date of filing this opinion a remittitur of $1000.00; that if said remittitur is filed within said date, then

the judgment of the Circuit Court shall be affirmed for $2000.00; if said remittitur is not filed within thirty days as is ordered, then the case shall be reversed and remanded to the Circuit Court of Peoria County.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

187

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 619

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 3 0 1932

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8348 Ag. 13

Mary Walsh,	:	
Defendant in error,	:	
-vs-	:	Error to the Circuit Court of LaSalle County.
William Connors,	:	
Plaintiff in error.	:	

JETT, P.J.:

This is a writ of error prosecuted by William Connors, plaintiff in error, with the view of reversing a judgment of the Circuit Court of LaSalle County obtained against him for $1200.00, in an action of assumpsit brought by Mary Walsh, defendant in error.

The declaration contains a special count and the common counts. The special count is based upon the breach of an alleged promise on the part of the plaintiff in error to pay the defendant in error $1200.00 in case she refrained from bringing a suit to contest the will of her father John Connors, which was to be paid when the estate was settled and all the claims against said estate were adjusted. The declaration also contained a count for merchandise sold and delivered, the consolidated money counts, and upon an account stated.

To the declaration the plaintiff in error pleaded the general issue and gave notice of special defenses to the effect that there was a settlement in full of all claims and demands and that as a result of said settlement the plaintiff in error paid certain sums of money simply to obtain his peace and avoid threats and annoyances; that the defendant in error never had any reasonable grounds to assert that the last will and testament of her father could be set aside or declared null and void, and that she had received large sums in the aggregate which exceeded her share in the estate and that therefore her claim was not made in good faith and was without consideration.

8243

Mary Wolan,

Defendant in error,

-vs-

William Conner,

Plaintiff in error.

1917, N.S.:

A number of reasons are assigned by the plaintiff in error for a reversal of the judgment.

The record discloses that Mary Walsh, defendant in error, and William Connors, plaintiff in error, are brother and sister.

The Seventh Clause of the Last Will of John Connors, deceased, reads as follows:

> "My reason for making this, my last Will and Testament, at this time and embodying therein these provisions, is that, considering the past services of all my children, the disposition of my property as herein contained is fair and equitable, and I trust that all of my said children will be satisfied therewith and that each will respect my memory by accepting the provisions hereof without complaint."

The Eighth Clause of said Will is as follows:

> "The reason why I give nothing in this Will to my daughters Margaret Brosnahan and Mary Connors is because they have been and are untrue to me. Also each of them has already received from my deceased wife, their mother, and from me, as much as they are each justly entitled to receive; also Margaret Brosanhan has not lived with me or assisted me in any way since she left my home fifteen years since, and my daughter Mary Connors has been already more than paid for anything she has done for me."

The record shows that after the death of John Connors Mary Walsh filed a claim against his estate for $541.45 on account of services she had rendered the father during his lifetime; that she employed an attorney to represent her; that a conference between plaintiff in error and defendant in error and their respective attorneys resulted in a compromise by which she was allowed $350.00. The defendant in error executed the following receipt:

> "In consideration for the payment to the undersigned of the sum of $350.00, the receipt for which is hereby acknowledged, I do hereby receipt in full and acknowledge full satisfaction and discharge of the claim filed by me, the undersigned, against the estate of said John Connors; said claim being in the total sum of $541.45 and accrued interest; and I do hereby relieve and discharge the said estate and the said William Connors, the residuary legatee under said Will, of all claims and demands whatsoever due to me, growing out of said estate, or to me by the said John Connors, deceased, in his lifetime."

A number of reasons are assigned by the Colonist to their

the a reversal of the judgment.

The record discloses that Judge Harrison in order,

and William Dresser, plaintiff in error, was in their just rights.

The record floods of the last fall of John Dresser, deceased.

reads as follows:

"My reason for voting this, my last
will and testament, at this time and de-
livering thereto these provisions, is that,
considering the vast experience of all as
children, the dangerous lure of property
as hereto fore-mentioned is fact and certainty,
and I trust that all of my said children
will be satisfied therewith and that each
will respect my memory by accepting the
provisions hereof without contest."

The eighth clause of said will is as follows:

"The reason why I give nothing to Edna
will be my knowledge heretofore
Mary Dresser is because they have been and
are entire to me. Edna used my sons in-
nocently received from my deceased wife, their
mother, and them me, in order to rob its rest
justly entitled to receive, also attempt
fraudulently to secure my property
me in any way else die left me. Edna Dresser
never since, but by fraudulent her, secured the
deed already more than paid for anything she
has done for me."

The record shows that after the death of John Dresser

Mary Dresser filed a claim against the estate for $921.50 on account

of services she had rendered him before moving to Victoria; that

she employed an attorney to represent her; that a conference be-

tween plaintiff in error and defendant in error and their respective

attorneys resulted in a compromise by which she was allowed $600.

The defendant in error executed the following receipt:

"In consideration of the payment
to the undersigned of the sum of $600.00,
the receipt for which is hereby acknowledged,
I do hereby release to [illegible] and
full satisfaction and discharge of the claim
filed by me, the undersigned, against the
estate of said John Dresser; and also for-
ever in the total sum of $921.50, and interest
thereon; and I do hereby ratify the dis-
charge the said estate and the said William
Dresser, the testator herein, and
will, of all claims and demands whatsoever
due to me, growing out of said estate, or
to me by the said John Dresser, deceased, in
his lifetime."

Said receipt was signed by defendant in error and dated June 2, 1927.

The defendant in error testified that her brothers John Connors, Timothy Connors and William Connors, plaintiff in error, came to her home at Dwight, Illinois, about a week after the death of her father and at that time plaintiff in error said he was sorry the will was made out as it was and that he would make it right with her; that her brothers Timothy and John Connors heard the statement; her brothers Timothy and John Connors testified that they had no recollection of going to the home of the defendant in error at the time and on the occasion mentioned by her and that they never heard any such conversation as was testified to by the defendant in error. John Connor testified he was never at Dwight at the home of defendant in error with her brother William, plaintiff in error.

Defendant in error contends that subsequent to the settlement of her claim by which she was paid $350.00, and for which she gave the receipt, she complained of the provisions of the will to her brother and threatened to bring a suit to set aside the will; that plaintiff in error agreed to pay her if she would not do so and that she had repeatedly requested him to make the payment but that he failed to make it and therefore she instituted that cause.

Plaintiff in error denied that he made any promises to pay defendant in error $1200.00 or any sum to prevent her from bringing suit to contest the will of her father.

Sometime afterwards defendant in error presented a claim for services against plaintiff in error. She employed an attorney in this behalf and they had a conference with the plaintiff in error and his attorney and thereafter an agreement was reached and she was paid $100. William gave her a note for $100. payable in six months from date and she executed a receipt which is in the words and figures following:

"This 31st day of March, A. D.

1928 received of William Connors his note for $100.00, dated March 31st, 1928, due in Six (6) months after date in full of any and all claims and demands of whatever kind and character that the undersigned may have or claim to have against him.

Dated at Ottawa, Illinois, this 31st day of March, A.D. 1928."

Nothing was said by the defendant in error at the times the settlements were made, to her attorneys about the alleged agreement on the part of the plaintiff in error to pay her $1200. if she would refrain from bringing a suit to contest the will.

We have examined the record and are of the opinion that the findings of the jury and the judgment of the trial court are manifestly against the weight of the evidence and that the contention of the defendant in error is unreasonable. We are unable to conceive how she could employ a lawyer to press a claim of $541.45 against her brother for services after the time she claims the agreement to pay her $1200.00 was made, and when she comes to a settlement of that claim and represented by her attorney, she makes no suggestion concerning the larger claim of $1200.

It does not appear that she she had any reasonable ground for bringing a contest. The recitals in her receipts are strong evidence of the want of good faith in her threat to institute proceedings, if indeed she ever made such a threat. We are inclined to the belief that the jury in reaching the verdict it did, was influenced by the admissions of improper evidence. The court, over objection of counsel for plaintiff in error, permitted the plaintiff to show the relations which existed between her and the other members of the family over a period of a number of years prior to the death of the testator; her experiences as a school teacher; her giving up of her profession and working at her father's house; a detailed account of the work she performed there; of a love affair; her marriage and the displeasure of the father over the marriage and other things

which were admitted in evidence which could shed no light whatever upon the alleged threat of the contest of the will. This improper evidence created in the minds of the jury a belief that Mrs. Walsh had not been fairly treated in the disposition of the estate and the verdict was the result of that influence rather than from any justifiable conclusion that the agreement of her brother William Connors to pay her $1200. was actually entered into.

The judgment is reversed on account of the errors in the admissibility of evidence and because the verdict appears to be contrary to the manifest weight of the evidence and the cause is remanded.

Judgment reversed and cause remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 619

BE IT REMEMBERED, that afterwards, to-wit: On MAR 10 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8385 *b

Ag. 24

The People of the State of Illinois, Petitioner, -vs- Harry J. Cooper, Respondent.	:	Contempt

JETT, P.J.:

On June 19th, 1930, Sarah E. Beckwith of the City of Aurora, County of Kane and State of Illinois, Warren W. Beckwith, Warren Wallace Beckwith, Jr., by Warren W. Beckwith his guardian and next friend, and Vera Beckwith, filed a petition in this Court directed against one Harry J. Cooper of the City of Aurora in said County and State, and represented that they, the petitioners, were appellants in a certain cause then pending and undetermined in the Appellate Court of the Second District in said State of Illinois; that said cause came to said Appellate Court by virtue of an appeal from an order of the Circuit Court of Kane County overruling a motion on behalf of said appellants (the petitioners here) to dismiss said proceeding then pending in the Circuit Court of Kane County, by reason of the lack of jurisdiction of said court over the persons interested in and the subject matter of a testamentary trust; that the appeal to this court was perfected by the filing of an approved appeal bond on December 30th, 1929; that upon the perfection of said appeal the jurisdiction of the Circuit Court of Kane County, if any, pertaining to said testamentary trust ceased and that of this court attached; that notwithstanding the fact that the Circuit Court of Kane County after December 30th, 1929, had lost jurisdiction over said cause, and although said Harry J. Cooper knew said appeal had been perfected, yet in total defiance of the jurisdiction of the Appellate Court of Illinois, Second District, and with complete disregard therefor, the

No. 2345

The People of the State of Illinois,	:	
Petitioner,	:	
-vs-	:	Contempt
Barry J. Cooper,	:	
Respondent.	:	

1927, P.J.:

On June 15th, 1926, Barry J. Cooper of the City of Kenosha, County of Knox and State of Illinois, Warren C. Bardwell, Walter Beckwith, Jr., by Eugene C. Bardwell the attorney and next friend, and Vera Bardwell, filed a petition in the County Court of said County and State, and represented that Barry J. Cooper of the City of Kenosha in said County and State, and hereinafter sometimes called the petitioner, were equitable owners of the legal title to a certain chattel lease mortgage on behalf of said mortgagee (the petitioner) to Theodore said mortgagee then pending in the Circuit Court of Knox County, in the State of Illinois, Second District, and also certain other chattels not described in said lease mortgage, but which were purchased by the petitioner from or through the said Theodore Beckwith, Jr., and Vera Bardwell, filed a petition in the County Court of Knox County,

said Harry J. Cooper on the 28th day of April, A.D. 1930, without notice to appellants, (the petitioners) or any trustee or beneficiary under said trust, applied to the Circuit Court of Kane County Ex Parte, the Hon. John K. Newhall presiding, and after a hearing obtained an order from the said Circuit Court finding that said Circuit Court had jurisdiction of said trust and that said Cooper was duly appointed and qualified as trustee, and directed the proceeds and revenues from said trust now accrued, or hereafter to accrue, should be deposited in the Old Second National Bank of Aurora, Illinois; and further directed that said Harry J. Cooper require the Western Wheeled Scraper Company of Aurora, Illinois, and the Austin Manufacturing Company of Harvey, Illinois, to deposit any and all dividends with said bank; that said order also required any and all trustees of said estate to deposit any money received from said corporations in said bank and authorized the bank to pay out said deposits upon the signature of said Harry J. Cooper alone; that said order also required said Sarah E. Beckwith to file a report showing her receipts and expenditures as trustee within thirty days from the entry of said order; that said Harry J. Cooper notwithstanding said appeal has, since the perfection thereof, attended a directors meeting of the Western Wheeled Scraper Company and sought to vote the stock therein owned by the trust estate of Warren Beckwith, deceased, and in other ways sought to direct the policy of the management of said estate and control the funds thereof to the exclusion of Sarah E. Beckwith, the sole surviving testamentary trustee, and Denis H. Grady and Dr. W.A. Sternberg, who are the trustees appointed by the Circuit Court of Henry County, Iowa; that said Harry J. Cooper is a director, and the said Hon. John K. Newhall, Judge of the Circuit Court of Kane County, was or is a director of said Old Second National Bank of Aurora, Illinois.

The petitioners prayed that a rule be entered by this Court requiring Harry J. Cooper to show cause, if any he have, within a reasonable time to be fixed by this Court, why an attachment should not issue against him for contempt of this Court and that he be pun-

ished for a contempt for wilfully pursuing a course of conduct defying the jurisdiction of this Court and calculated to bring the Court into disrepute and disrespect. On April 21st, 1931, a supplemental petition was filed by Sarah E. Beckwith, individually and as trustee testamentary of the estate of Warren Beckwith, deceased, together with the other petitioners mentioned in the original petition filed herein, and represented that there is pending in this Court a proceeding wherein it is sought to cause Harry J. Cooper, respondent herein, to be punished for contempt; that said proceeding was instituted on or about June 19th, 1930, by petitioners herein; that the facts and circumstances hereinafter set forth were unknown to the petitioner s at the time of the filing of the original petition, and that such facts and circumstances hereinafter set forth but recently came to the knowledge of these petitioners, and that the petitioners, at the time of the filing of the original petition herein, had no means of ascertainment of the facts hereinafter to be related; that said cause pending in this Court was perfected by the filing of an approved appeal bond on December 30th, A.D. 1929, and that upon the perfection of said appeal the jurisdiction of said Court of said Kane County, if any, pertaining to the subject matter of said appeal ceased and the jurisdiction of the Appellate Court attached; that notwithstanding the fact that the Circuit Court of Kane County after December 30th, 1929, had lost jurisdiction over said cause and said Harry J. Cooper knew that said appeal had been perfected, and although the fact that the jurisdiction of said appeal was attached to this court, said Harry J. Cooper in total defiance of its jurisdiction and with complete disregard therefor, began and pursued a course of conduct calculated to cast discredit on the said Appellate Court, in this, that the said Harry J. Cooper took complete charge and control of the funds and property of said trust estate and collected the income, issues and profits therefrom, and exercised dominion and control over said funds and issues therefrom to the exclusion of Sarah E. Beckwith, the testamentary trustee; that while said Harry J. Cooper had

control of said funds and the proceeds therefrom, he made sundry and numerous expenditures therefrom without notice to said Sarah E. Beckwith, the testamentary trustee, or without notice to any person interested in said trust fund, and that on January 8th, 1930, and divers days thereafter up to and including October 27th, 1930, he expended and caused to be expended various sums of money which are set out in the supplemental petition, and that said expenditures were made by said Harry J. Cooper on his own personal orders and without notice to any of the persons interested in said trust estate and without notice to or the consent of Sarah E. Beckwith, testamentary trustee of said estate, or without notice or consultation with the trustees appointed by the Circuit Court of Henry County, Iowa; that the items of expenditures of the said Harry J. Cooper appear in the report which was filed by said Cooper in the Circuit Court of Kane County wherein he sought an order of said Circuit Court of said County approving his actions and expenditures. Petitioners again prayed that the supplemental petition be taken and considered in connection with the original petition filed herein and pray that Harry J. Cooper be adjudged in contempt of this court for wilfully pursuing a course of conduct defying the jurisdiction of this Court and calculated to bring the Court into disrepute, and that he be punished etc., for contempt.

The said Harry J. Cooper, respondent, answered the original and supplemental petitions and set forth that on May 24th, 1929, the Circuit Court of Kane County entered an order appointing him co-trustee with said Sarah E. Beckwith of the trust estate of Warren Beckwith, deceased, created by the last will and testament of said deceased, which said order was entered upon a petition of the respondent filed in the Circuit Court on said May 24th, 1929; that by said order Sarah E. Beckwith was to continue as co-trustee in the matter of said trust estate; that her bond was fixed at $50,000. and that the same was filed and approved by the Court; that Sarah E. Beckwith prayed an appeal from the order appointing the respondent trustee and subsequently withdrew the same; that the said Sarah E. Beckwith, trustee, and the

other petitioners entered a motion in said Circuit Court at the May Term 1929, to dismiss the proceedings in the Circuit Court in the matter of the trust estate of Warren Beckwith, deceased; that the motion was heard, and on the 31st day of October, 1929, the motion to dismiss was overruled and from said order overruling the motion to dismiss an appeal was prayed for to the Appellate Court of the Second District, which appeal was perfected and the transcript of record filed to the February Term 1930 thereof.

Further answering the respondent denied that upon the perfecting of said appeal the jurisdiction of the Circuit Court of Kane County ceased and that of the Appellate Court attached; denied that the Circuit Court of Kane County, after the filing of the appeal bond on December 30th, 1929, lost jurisdiction over the trust estate; that the appeal by said Sarah E. Beckwith, and the other parties joining therein, was from the order of the Circuit Court entered on October 31st, 1929, overruling the motion to dismiss said proceedings; denied that the Appellate Court acquired jurisdiction of said trust estate by virtue of said appeal and denied that said order appointing the respondent as such trustee was in any manner suspended or affected by the appeal from said order denying said motion.

Respondent answering states that he is advised by his counsel and believes that the appeal from the order overruling said motion to dismiss said proceedings did not bring before the Appellate Court for review the order appointing him trustee except as a mere incident and as a matter of proof in connection with the motion to dismiss; that the appeal perfected by the petitioners presented for review only the order from which said appeal was prayed and allowed; that the overruling and denying said motion to dismiss did not operate as a supersedeas so that the execution of the order appointing him as trustee was suspended or in any wise affected during the pendency of the appeal; that the Circuit Court had jurisdiction to enter the order appointing respondent such co-trustee.

Further answering the respondent says that the things he did under and by virtue of his appointment as trustee was done in good faith because he believed it was his duty to so act in dealing with the trust estate; that the sum or sums of money paid out by him as trustee was done under and by the direction of the order of the Circuit Court of Kane County; that after the decision of the Appellate Court directing the Circuit Court of Kane County to relinquish jurisdiction and to dismiss the proceedings, he filed his petition in the Circuit Court of Kane County advising Judge Newhall of the decision and requested instructions as to the filing of a petition for certiorari, and under the directions of the Circuit Court filed a petition for certiorari in the Supreme Court; and that in so doing he necessarily incurred expenses, all of which was advised and directed by the Circuit Court of Kane County and that the prosecution of the said certiorari and the incurring of said expenses was pursuant to the authority and direction of the said Circuit Court; that Sarah E. Beckwith was not notified of the application for said orders for the payment of said expenses complained of because she refused to recognize the respondent as co-trustee and declined to have any relations with him as such trustee; that the trust funds derived from said trust estate were deposited in the Old Second National Bank after the appointment of this trustee in the same manner as they had been so deposited for more than twenty years prior to the appointment of this respondent as trustee.

Further answering said respondent says he is not a lawyer and could rely only upon the Circuit Court and his view with respect to his appointment and as to the rights, obligations and duties as such trustee as well as upon the advice of his attorneys; that in all his conduct as a trustee he disclaims any intention whatever of doing anything either by way of commission or omission to ignore the jurisdiction of the Appellate Court or to commit any act in violation of its jurisdiction or dignity.

The proceeding sought to be dismissed, mentioned in the original and supplemental petitions, was from an order of the Circuit

Court of Kane County refusing to dismiss certain proceedings there pending, wherein a testamentary trust under the will of Warren Beckwith, deceased, was being administered. It appears that Warren Beckwith a resident of Mt. Pleasant, County of Henry, and State of Iowa, executed a last will and testament on September 15th, 1897. After making certain bequests in favor of his wife and daughter he created a testamentary trust for the benefit of his three sons. The said Warren Beckwith, testator, by said will appointed his wife, Sarah E. Beckwith, Mt. Pleasant, Iowa, Charles W. Smith of Aurora, Illinois, and W. I. Babb of Mt. Plesant, Iowa, as executors and exempted them from giving bond as such executors for the discharge of any trust or duty under the will. He directed the said executors to hold, manage, control, invest and reinvest such trust estate. He provided that in case of the death or refusal to act of any one or more of the trustees "the Probate Court shall appoint some trusty and discreet person or persons" as successor or successors in trust who are to give sufficient bond. Subsequently the testator executed a codicil to his will. On October 2nd, 1905, the testator departed this life, and the will including the codicil was admitted to probate by the District Court of Henry County, Iowa. The executors and trustees named in the will qualified and proceeded to the administration of the estate. On December 19th, 1908, an order was entered in said court closing and settling the estate and discharged the executors as such. It recited, however, that the executors are not discharged or freed from any other liabilities imposed upon them under said will but are continued in office for the purpose of carrying out their duties as to the remaining assets of said estate with all of the powers conferred upon them under the will and that they are directed to make a report from time to time to that court or to such other court to which administration of such trust may be removed.

It appears that Sarah E. Beckwith and W. I. Babb, two of the trustees moved from Henry County, Iowa, to Aurora, Illinois, in 1908. The property constituting the trust fund was largely the stocks

in industrial corporations in Illinois. Charles H. Smith, the third trustee, died in 1910. Mrs. Beckwith and Babb continued to act as co-trustees until Babb's death September 4th, 1925. Subsequently Myron C. Atwood of Aurora was appointed to succeed W.I. Babb. Atwood qualified and acted as a trustee until February 26th, 1929, when he died. After the death of Atwood, Mrs. Beckwith appeared in the Circuit Court of Kane County and by petition requested the appointment of one Denis H. Grady as a co-trustee to assist in administering the trust estate remaining, etc., a part of the estate having been previously given to sons according to the provisions of the will. The court refused to appoint Grady and appointed one Harry J. Cooper of Aurora, trustee, and fixed his bond at $50,000. Subsequently the petitioners filed a motion asking the court to relinquish jurisdiction over the estate and dismiss the proceedings, which was by the court denied and an appeal was prosecuted to this court. An opinion was written by this court and the same was filed on July 7th, 1930, and was reported in 258 Ill. App. 411, in which it was held that the trustees had wrongfully procured the Circuit Court of Kane County, Illinois, to assume jurisdiction over the trust estate and that the motion for the court to relinquish such jurisdiction and dismiss the proceedings should have been allowed. A petition for a writ of certiorari was filed by Harry J. Cooper in the Supreme Court to have the case reviewed. The writ was denied and the opinion of the Appellate Court became final. In his answer to the original and supplemental petitions the respondent insists that the motion to dismiss the proceedings and the denial thereof by the court was not a final order and that an appeal from the order denying the motion to dismiss did not deprive the Circuit Court of Kane County of its jurisdiction. The appeal from the order denying the motion of the petitions to dismiss the proceedings, pending in the Circuit Court of Kane County administering the trust estate in question, was filed December 30th, 1929, and a certificate of evidence was filed on January 8th, 1930. After the perfecting of the appeal on December 30th, 1929, the cause was pending in the Appellate

Court and would pend there until its termination by a decision of the court. Notwithstanding the fact that the appeal had been perfected and with notice to the respondent he appeared before the Circuit Court of Kane County on April 28th, 1930, and obtained an order from said Circuit Court finding among other things that the Circuit Court now (i.e. April 28th, 1930) has jurisdiction of the subject matter of said trust; (2) that said Harry J. Cooper (respondent herein) is now acting as co-trustee; (3) that respondent was a duly qualified and acting trustee; and ordering (1) that the income from certain shares of stock owned by said trust estate should be deposited with the Old Second National Bank of Aurora, (2) that Harry J. Cooper notify certain corporations thereafter to deposit all dividends in the bank; (3) that said corporations be notified that they be not required to look to the application of any such dividends as trust funds; and (4) Sarah E. Beckwith as one of the trustees shall file a written report of the assets and expenditures in said trust estate within thirty days from the entry of the order and that Harry J. Cooper should notify her.

It appears that the respondent continued to act as trustee not only during the pendency of the cause in the Appellate Court but after the filing of the opinion by the Appellate Court and subsequent to the time of the refusal of the Supreme Court to hear the case on a petition for a writ of certiorari. This court held that the Circuit Court did not have jurisdiction to appoint a trustee.

When the Circuit Court denied the motion to dismiss the proceedings for the want of jurisdiction and the appeal was perfected, the Circuit Court of Kane County then lost jurisdiction over the case. It is argued by the respondent that this was not a final order and for that reason the court did not lose its right to entertain jurisdiction of the subject matter. It was a final order and such an order that properly could be appealed from and it was appealed from and it was held as hereinbefore stated that the Circuit Court of Kane County had no jurisdiction in the premises. After the appeal bond is duly filed the jurisdiction of the trial court ceases and that of the Appellate

tribunal attaches. The effect of perfecting the appeal is not to vacate the judgment, order or decree appealed from but to suspend its operation.

In People vs. Pam, 276 Ill. 181-184, the court said, "All the cases from ex Parte Thatcher, 2 Gilm. 167, down to the present time hold that a perfected appeal operates to stay any further proceedings by the court rendering the judgment or decree appealed from. The only exception to this rule we know of is that in divorce cases after an appeal has been perfected, the trial court may make a further order as to alimony but this is expressly authorized by statute, and in Elzas vs Elzas, 183 Ill. 160, and Jenkins vs Jenkins, 91 Ill. 167, it was said that this statute created an exception to the rule depriving the court rendering the decree of jurisdiction to enter further orders in the case after an appeal was perfected."

In Masters vs Masters, 243 Ill. App. 252-257, the court said: "The law is well settled that when an appeal in the case is perfected to the Supreme or Appellate Court the court from which the appeal has been taken loses jurisdiction of the case until after the appeal has been finally disposed of by appellate tribunal."

In Watkins vs Dunbar, 318 Ill. 174, the court held; "Where an appeal is perfected to the Appellate Court the Circuit Court loses jurisdiction of the case, all proceedings in the Court are stayed, and it has no authority to enter any order until the case is properly reinstated."

In McCoy vs The Acme Automatic Printing Company, 278 Ill. 276, the court, in speaking of the effect of perfecting an appeal, among other things said: "The appeal removed the cause to the Appellate Court and the trial court lost all jurisdiction and had no power thereafter to enter any order on the motion to vacate the judgment."

When an appeal bond is filed the jurisdiction of the trial court ceases and that of the appellate tribunal attaches and all subsequent proceedings are procedure in the appellate tribunal. David vs The Commercial Mutual Accident Company, 243 Ill. 43.

The only question remaining to be disposed of is whether or not the respondent is entitled to be discharged as having purged himself. In his answer the respondent states that he is not a lawyer and could rely only upon his attorneys and the Circuit Judge and his view with respect to the rights, obligations and duties of himself as such trustee under all of the facts and circumstances, all of which were within the knowledge of said Circuit Judge; and the said respondent further answering states that in all his conduct as such trustee he disclaims any intention whatever of doing anything, either by way of commission or omission, to ignore the jurisdiction of this court or to commit any act in violation of its jurisdiction or dignity.

From which is disclosed by the record we take it that the contempt complained of is what is known as a criminal contempt. The rule is that in criminal contempts alleged to have been committed out of the presence of the court, if the defendant's sworn answer is sufficient to acquit him he is entitled to be discharged. Oster vs People, 192 Ill. 473-479.

In Re Estate of Beckwith vs Cooper, 258 Ill. App. 411, we said that the jurisdiction wrongfully assumed by the Circuit Court over the trust estate should be relinquished and the proceedings in that court should be dismissed. This was a mandate, which should have been promptly obeyed by that court and regarded by the litigants. The Circuit Court of Kane County had no authority to appoint a trustee, and attempts to administer the trust since the opinion of this court was filed have been in violation of our order. However, the respondent disavows all intention to disobey or disregard the mandate, and asserts that his acts were done in good faith as a result of advice of counsel and directions of the chancellor. We must take it as true that he received and acted upon such advice and directions. If he did, the fault does not lie in him and he stands purged of contempt. The rule against him is for that reason discharged.

Rule discharged.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 619

BE IT REMEMBERED, that afterwards, to-wit: On MAR 10 '32 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8386 Agenda 25.

The People of the State
of Illinois,
Petitioner,
vs. Contempt
Harry J. Cooper,
Respondent,

Jett, P.J.

The matters and things involved in this cause are controlled by the opinion filed in The People of the State of Illinois vs. Harry J. Cooper, being General No. 8385. For the reasons therein stated the rule against him, the said respondent, the said Harry J. Cooper, is discharged.

Rule discharged.

Cause No. 3246

The People of the State
of Illinois,

Petitioner,

vs.

Henry J. Cooper,

Respondent,

Left, T.J.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 620

BE IT REMEMBERED, that afterwards, to-wit: On APR 7- 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A.D. 1931

Herman A. Marten, Conservator of the Estate of Christ Guehler,

appellee,

vs.

Bert W. Meads, et al,

appellant,

and

W. C. Gilmore, et al,

appellants,

vs.

William Guehler, et al

appellees.

Appeal from the Circuit Court of La Salle County

Consolidated.

WOLFE, J:

Herman A. Marten, as conservator of the Estate of Christ Guehler, filed a bill in the Circuit Court of La Salle County, Illinois, against W. C. Gilmore and Bert W. Meads to set aside and cancel a note for the sum of $5,000.00, which note had been executed by said Christ Guehler to said Bert W. Meads, and also to cancel a certain trust deed given to W. C. Gilmore, as trustee, which had been executed by the said Christ Guehler on a seventy acre farm owned by Guehler, and which had been given to secure the payment of the $5, 000.00 note to W. C. Gilmore, as trustee, and Bert W. Meads as the owner of the $5,000.00 note, filed suit in said court to foreclose said trust deed, alleging that default had been made in the payment of interest coupons on said note.

The two cases coming on for hearing, were, by agreement of the parties and order of the court, consolidated for all purposes, the same questions being raised in each case. The theory on which the complainant in the first case sought relief, and on which

-2-

In the Appellate Court of Illinois

Second District

October Term, A.D. 1941

Herman A. Barton, Conservator of the Wards of Ernest Gumbler,

Appellee,

vs.

Bert W. Meade, et al,

Appellant,

and

W. O. Gilmore, et al,

Appellants,

vs.

William Gumbler, et al

Appellees.

Complaint for Injunction

Appeal from the Circuit Court of De Kalb County

Memorandum Opinion

MOLYNE, J:

Herman A. Barton, as conservator of the wards of Ernest Gumbler, filed a bill in the Circuit Court of De Kalb County, Illinois, against T. O. Gilmore, et al. Under the bill said Gumbler and counsel a note for the sum of $3,000.00, which note had been executed by said Ernest Gumbler to said Bert W. Meade, for the to cancel a certain trust deed given by T. O. Gilmore, as trustee, which had been executed by the said Ernest Gumbler on a warranty note then owned by Meade, and which had been given to secure the payment of the $3,000.00 note to W. O. Gilmore, as trustee, and Bert W. Meade as owner of the $3,000.00 note. Under said in said court to foreclose said trust deed, alleging that default had been made in the payment of interest coupons on said note.

The two cases coming on for hearing, were, by agreement of the parties and order of the court, consolidated for all purposes, the same questions being raised in each case. The theory on which the complainant in the first case brought suit, was to enjoin

defense was made in the second case was, that at the time of the execution of the note and trust deed Christ Guehler, the maker thereof, was mentally incompetent to execute said note and trust deed, or to transact ordinary business.

The case was referred to the Master in Chancery to take and report the proof, but for some reason the Master was not to report either his conclusions of law or of the facts. The proof was taken and reported to the court and a hearing had on such proofs. After examination of the record the court held that the equities of the case were with the complainant in the first suit, and with the defendants in the second suit; that at the time of the execution of the note and trust deed Christ Giehler was mentally unsound and was not mentally responsible for his acts. The court ordered that the trust deed and note be surrendered and cancelled. It is from this decree that this appeal is prosecuted.

In the year of 1890 Christ Guehler came to this country from Germany. He had some schooling in Germany, but had never gone to school in the United States, and could neither read nor write the English language, except to write his own name. Christ Guehler's father owned a 70 acre tract of land in La Salle County near the town of Earlville. This land is the same that is covered by the trust deed involved in this suit. After the death of the father Christ Guehler acquired this 70 acre farm, and he and his sister, Lena Guehler, lived on the same until his death. Christ farmed the premises and carried on the ordinary farming operations. Some time about the year 1900 he was overcome by the heat, and it is the contention of the appellees that this seriously affected him mentally, as well as physically from that time down to the day of his death, and that he was always reserved and somewhat peculiar. Sometime during the year 1919, at which time real estate prices for farm land were very high, Christ Guehler sold his farm to one R. A. Strong. He immediately became dissatisfied and

repurchased it from Strong, giving Strong $2,500 to release him from his contract of sale. Some time in the summer of 1920 he again decided to sell his farm and went to one T. E. Kidney, a real estate agent, and asked him to sell it for him. Kidney say the defendant Meads and Meads finally agreed to purchase the farm for $360.00 per acre, (which the evidence shows it was reasonably worth $500.00 to $550.00 per acre) that being the price asked by Guehler for the farm. A contract was entered into on July 3, 1920, by which Meads agreed to pay $500.00 cash to Guehler, but how the balance was to be paid does not appear from the evidence. Mead was a tenant farmer and apparently was not a man of any means.

After the sale was made a great many people told Guehler that he should not have sold the farm. His sister opposed the sale. She did not wish to leave the farm. He immediately offered Meads $8,000.00 to let him out of the contract, which offer Meads refused. Meads did tell him to the effect that if he could find and furnish him a farm as good as the one Guehler had sold to him he would let him off. Guehler then went to a man named Albert Schmidt and asked him to try to get the land back for him. Schmidt saw Meads and told him if he would take what Strong got, that is $2500.00, he would see Guehler and see if he would give it. Meads told Schmidt that Guehler had already offered him $8,000.00 and he would not take it. Meads said he would not accept the offer made, but would take another piece of land as good as that of Guehler's. Shortly after this conversation Guehler arrived at an agreement with Meads which provided that Meads should cancel the contract and in consideration therefor Guehler would pay Meads the amount he had paid, which was $500.00, $1000.00 in cash and his note for $5000.00 secured by a trust deed on the land.

At the time of this transaction and for sometime previous thereto, the defendant in the original bill, W. C. Gilmore, was

cashier of the Earlville National Bank. It appears from the evidence that this bank drew papers for their customers, etc. That on September 22, 1920, Guehler and Meads went to the Earlville National Bank to close up the deal and that Gilmore drew the note and trust deed for them. Prior to this date Schmidt, the man who had endeavored to make the deal between Guehler and Meads, but had failed, told Gilmore that Guehler was mentally incompetent and because of that fact incapable of making a contract. Gilmore drew the notes and trust deed as directed, but before they were signed by Guehler, Gilmore called in Dr. W. F. Holstein, a practicing physician of Earlville to see Guehler and ascertain whether or not he was mentally competent to sign a contract.

Willis A. Marten, who is now president of the First National Bank of Earlville, drafted the contract between Guehler and Meads for the sale of the farm. After the note and trust deed were drawn, Guehler, Meads and Gilmore went to the First National Bank where the contract between Guehler and Meads had been left, and Guehler told the cashier of that bank that he had bought the farm back from Meads.

A short time after Guehler executed this note and trust deed, Herman A. Marten, complainant in the original suit herein, filed a petition in the County Court of La Salle County to have Christ Guehler declared mentally incompetent and prayed that a conservator might be appointed to take charge of and manage Guehler's estate. The hearing was had on the said petition. Guehler was declared mentally incompetent and Marten was appointed conservator. On November 3rd, 1920, Christ Guehler committed suicide. He left a last will and testament which had been executed on March 25, 1919, which will was duly admitted to probate in La Salle County. By this will he left all of his property to his sister, Lena Guehler, who died during the pendency of this suit on August 21,1925.

Much evidence was heard bearing upon the question of the mental condition of Christ Guehler during the latter part of his life, but with the above statements of fact there is little, if any, dispute, and we think this fairly sets forth the transactions as shown by the evidence.

Numerous errors have been assigned by the appellants why this decree is erroneous and should be reversed by this court. But the main contention is, that the court erred in finding that Christ Guehler was of such unsoundness of mind at the time the note and trust deed were executed that they should not be held to be binding instruments as against his estate. Each side to this litigation had quite an array of witnesses, one side testifying that in their opihion Guehler was of sound mind and memory, and able to transact ordinary business; the other side was just as positive that Guehler was not of sound mind or able to transact ordinary business. The witnesses called by each side were about equal in number, but there are other circumstances connected with this transaction that lead us to believe that the evidence given on the part of the original complainants should be given more weight then that of the defendants. It seems strange that a banker, before he would take the signature to a note and trust deed, would call in a doctor to have the person who was going to execute the note and trust deed, examined as to his mental condition, unless there is a strong reason to believe that the man was not sound mentally at the time he was going to execute the paper. To say the least this is an unusual business procedure. The evidence shows that Gilmore and Meads had been warned about the mental condition of Guehler, and then for their protection they call in a doctor who sits by and watches the transaction, and then says, that in his opinion Guehler was sound mentally and able to transact the business in which he was engaged. While the evidence is very

conflicting, this court is not justified in saying that the Chancellor committed reversible error in finding that Guehler was unsound mentally at the time of the execution of this instrument.

The appellants strongly insist that the court erred in finding Gilmore and Meads practiced a fraud upon Christ Guehler at the time of the execution of this instrument. They insist that the burden of proof of fraud is upon the person charging it, and cite Mosbarger v. Brown, 313 Ill. 239, as sustaining their contention.

An examination of that case discloses that the facts are entirely different from the present case. In the Mosbarger case the parties were dealing at arms length and the defendant was claiming fraud in the execution of a contract. The court held that the burden was upon the complainant to prove by clear and convincing evidence that fraud had been perpetrated upon him. In this case the burden of proof was upon the original complainants to show mental incompetency of Christ Guehler at the time of the execution of the instruments, and we think they have successfully shown that fact. After mental incapacity has been established and fraud is charged in a transaction, then a different rule prevails. In Hinkley v. Wynkoop, 305 Ill. 122, a case similar to this was under consideration, and the court says on page 122: "A presumption arises against the validity of the transaction in a case where the real mental weakness of one of the parties is shown, and the burden of proof in such case rests upon the party claiming the benefit of the conveyance or of the contract to show its perfect fairness and the capacity of the other party. In this case the transaction is shown to be very unfair and the mental condition of the appellee to be very bad. Where mental weakness of one party to a transaction not of itself sufficient to destroy capacity is accompanied by undue influence, inadequacy of price, advantage taken of pecuniary necessities, ignorance and want of advice, misrepresentation or concealment, and the like, a contract or conveyance procured under

such combined conditions will be defeated or set aside. It is not simply a presumption of invalidity which thus arises, but the presumption has become established." We think in this case that the burden was placed upon the appellee to show the good faith of the transaction. Sands v. Sands, 112 Ill. 225.

It is also insisted by the appellants that the trial court committed error in assessing the costs of suit against W. C. Gilmore and Bert W. Meads individually, as Gilmore was a party to the suit merely as trustee. In this we think that the appellants are in error. An examination of the original bill discloses that the suit was brought against Bert W. Meads and W. C. Gilmore; that a summons was prayed for and issued against Meads and Gilmore as individuals. The return of summons shows that each was served individually. The appellee charges Meads and Gilmore each with practicing fraud in the procurement of the note and trust deed. The answer filed by Meads and Gilmore is signed by Bert W. Meads and W. C. Gilmore, not as trustee, or in any other representative capacity. We think under the evidence of the case the court properly held that at the time the note and trust deed were executed, that Christ Guehler was not a man of sound mind, and that he was mentally incapable of entering into a binding contract; that Meads and Gilmore had knowledge of this condition, and, that it was a fraud practiced upon Guehler at the time he entered into this agreement and signed the note and trust deed, and the court did not err in assessing the costs against Gilmore.

Gilmore insists that he did not benefit any by the transaction, and therefore, he should not be held liable in any way even for the costs of the suit. The evidence shows that he assisted in this transaction, and under the law, one who assists another to obtain undue advantage over a person of unsound mind, although he may not benefit by the transaction, is liable the same as though he had

made the transaction himself. Miller v. John, 208 Ill. 173; Liscomb v. Allen, 298 Ill. 545.

The appellee assigns cross-error alleging that the Court erred in not ordering the defendants to repay the One Thousand Dollars that Christ Guehler had paid to Meigs at the time of the execution of the note and trust deed. The appellee in his printed brief and argument does not argue this question and we find nothing that would assist this court in any way in deciding whether the trial court had erred in this particular, and for this reason this court will not decide that question.

We find no reversible error in this case and the judgment of the Circuit Court of LaSalle County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thonsand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8338

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 620

BE IT REMEMBERED, that afterwards, to-wit: On MAY 13 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8338 Ag. No. 7

ELIZABETH McAULIFF,

Appellee,

vs.

JOHN F. HAWLEY, Executor of the Last Will and Testament of Wm C. Hawley, deceased,

Appellant

Appeal from the Circuit Court of McHenry County.

JETT, P.J.

This is an appeal from a judgment obtained in the Circuit Court of McHenry County for $2,000.00 by Elizabeth McAuliff, appellee, against John F. Hawley, appellant, as executor of the Last Will and Testament of Wm C. Hawley, deceased.

It appears that a claim was presented by appellee in the County Court of McHenry County against the estate of Wm C. Hawley, deceased. A hearing was had and judgment rendered from which an appeal was prosecuted by the executor to the Circuit Court, in which court the claim of the appellee was allowed in the sum of $2,000.00 and this appeal is prosecuted by the executor.

This suit involves a claim for nursing by the appellee of Wm C. Hawley and his wife. The family of Wm C. Hawley consisted of himself and wife. For a number of years appellee worked for them. Mrs. Hawley died on or about the 13th day of December, 1927, and Mr. Hawley died December 14th, 1928. The evidence shows that appellee had been in the home of Mr. and Mrs. Hawley for several years; that Mrs. Hawley was sick for quite a period of time and while Mr. Hawley was up and around and able to assist in caring for her, the burden was cast upon appellee. After the death of Mrs. Hawley, Mr. Hawley became infected with an extreme case of eczema which gradually grew worse and appellee nursed him and cared for him until his death. The evidence shows that the

vs.

affliction of Mr. Hawley was of a loathsome nature, his body was covered with scabs and it was necessary to bathe him and apply greasy applications. His body was covered with sores which would scale off. Some of the sores would bleed and as the witnesses say "he was in an awful condition." His head was covered with scales and sores and he lost all of his hair.

The main contention is as to the value of the services rendered by appellee. It is contended by the appellant that appellee had in effect been paid for the services rendered and that she was employed as a housekeeper only. We have examined the evidence and are of the opinion that the testimony discloses the fact that she was paid for the services as a housekeeper during the lifetime of Mrs. Hawley and a part of the time after her death, but the evidence does not show that she has been paid for her services as a nurse. It was claimed also that there was a contract and that it was improper to hear testimony bearing upon the question of what the services that were rendered by appellee as a nurse, were reasonably worth. There was no contract covering the services rendered by appellee as a nurse. The question then is, does the testimony show what the services rendered by appellee were reasonably worth? The condition of Mr. Hawley and the nature and character of the services appellee was required to render, enter into the question of the value of the services.

A Mrs. Rasmussen who lived next door to the Hawleys and had known them for about two years and was in the house every day and sometimes twice a day, among other things, testified: "He was a very sick man. He had some kind of a disease on his head and from his knees to his feet. He was covered with disease. His face was covered. His head was covered and he lost all his hair. I did his washing. It was terribly dirty. His handker-

chiefs were all full of blood and stained and scaley. Mrs. McAuliff made night caps for him and they were in the same condition. I saw her wash the scales off and then grease him. It was a terrible sight to look at. No other person was assisting Mrs. McAuliff. I was there when Mrs. Hawley was alive. I do not know what she had but she was awfully sick too. She was up and around but she was hard to take care of. Mrs. McAuliff always had to lift her up and around. She stayed with the old lady until she died and along towards the last of the life of Mrs. Hawley she was bedridden too."

Dr. Alford testified: "Have never had to treat a case as severe as this one. There is no way of fixing a regular price for such a case. The services that this woman actually performed for that man could not be estimated in dollars and cents. It was worth more than $50.00 a week."

Mary Agnes Large testified that she was a trained and graduate nurse; was superintendent of the hospital in the City of Woodstock; had been in the nursing business for eighteen years; had charge of the Ovitz Hospital in Wisconsin before coming to Woodstock; did nine years of private duty work and the rest had been institution work; have seen a person who had eczema that covered practically the entire body; they are not frequent cases; a nurse is not obliged to take a case; the reason a graduate nurse cannot be retained to care for a case of eczema is that they are very infectious; they are very dangerous too; that the services of appellee were worth $75.00 to $100.00 a week.

Objection is made to the proof of appellee bearing upon the question of the reasonable value of the services which were rendered. We think, taking the entire record into consideration, the evidence tends to show the value of the services and

there is no proof to the contrary on the part of the appellant. Some of the testimony was wholly improper but that which was improper was stricken by the trial judge. We are of the opinion that there is sufficient evidence which was competent to be heard that was not stricken by the court to establish the claim.

It must be kept in mind that this was a very loathsome case and it was difficult to set any standard by which the witnesses could judge what the services rendered in a case of this kind would be reasonably worth.

It is also contended by the appellant that the court erred in refusing to give to the jury a special interrogatory requested by him. The special interrogatory is as follows: "State what amount, if any, you have allowed the claimant in your verdict for nursing services to Mrs. Hawley? $_____." The record discloses that this special interrogatory was not handed to the court as such to be presented to the jury for an answer, but was given to the court in the form of an instruction to be given the jury and as such the court properly refused to give it. However, if it had been presented in the proper manner and refused, it would not have been reversible error for the jury allowed the claimant less than the amount which she claims was due her for nursing Mr. Hawley.

A motion was made by appellant to strike the brief of appellee from the files and the reason assigned therefor was that Rule Seventeen of this court had been violated. There is some ground for criticism of appellee's brief in failing to cite the page of the abstract or the page of the record when the attention of the court is called to certain evidence. We have examined the brief, however, and we are of the opinion that there is not such a violation of the rule that would authorize the striking of appellee's brief.

The record shows that Hawley left no children or descendants of child or children; that appellee rendered the services and cared for him and accompanied him wherever he went after the death of his wife. We think she is entitled to recover.

The judgment of the Circuit Court of McHenry County is therefore affirmed.

Judgment Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8371

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 620

BE IT REMEMBERED, that afterwards, to-wit: On MAY 13 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

FRANK GRAY, Administrator of the Estate of Helen Gray Pierson, deceased, Defendant in Error	:	Error to the Circuit Court of Warren County.
vs.	:	
GERALD JOHNSON, Plaintiff in error.	:	

JETT, P.J:

Frank Gray, administrator of the Estate of Helen Gray Pierson, deceased, defendant in error, instituted suit in the Circuit Court of Warren County to recover damages on account of the death of Helen Gray Pierson, occasioned as averred by the negligence of Gerald Johnson, plaintiff in error.

A jury trial was had resulting in a finding in favor of defendant in error and assessing damages in the sum of $5,000. It is from the judgment entered on the verdict of the jury for the said sum of $5,000 that the plaintiff in error prosecutes this writ of error.

The declaration consists of four counts, each charging that defendant in error's intestate was an invited guest of plaintiff in error, riding in his automobile along the hard surfaced road between Monmouth and Galesburg, Illinois. The first count avers that Gerald Johnson, plaintiff in error, improperly drove, ran, used, managed, operated and controlled his automobile; the second avers that the plaintiff in error so wilfully, wantonly and recklessly drove, managed, operated and controlled his automobile at the time and place aforesaid that the said automobile of the plaintiff in error by reason of the

[illegible] GRAY, [illegible]on of the [illegible] of [illegible] Grey Pictures, Deceased,	:
	:
	:
	:
Va.	:
	:
[illegible] Insurance Company.	:
	:
	:
It Exhibit No. [illegible]	:

Appeal from [illegible] Court of [illegible] County.

wilful and wanton conduct of the plaintiff in error left the concrete pavement and violently turned over at and near what is known as the Barney Miller curve, six miles northeast of the City of Monmouth on the Monmouth-Galesburg road. In the third it is averred that the plaintiff in error carelessly, negligently and improperly drove, managed and operated his said automobile at a high and dangerous rate of speed; the fourth avers the violation of the Motor Vehicle Law in this, that the plaintiff in error drove the automobile at a speed greater than thirty-five miles per hour and that the said speed was greater than was reasonable and proper, having regard for the traffic and use of the way. Counts one, three and four aver the exercise of due care and caution on the part of the deceased for her own safety. To the declaration the plaintiff in error pleaded the general issue.

The record discloses that after dark on the evening of the 17th of March, 1929, plaintiff in error and defendant in error's intestate were riding from Monmouth towards Galesburg in the car of plaintiff in error; the car was a four cylinder Dodge Coupe, 1925 model, which had been run about 25,000 miles; the tires were in good condition before the injury complained of and plaintiff in error was driving the car and the deceased was sitting in the seat beside him. From a point known as Minor Hill to the Barney Miller curve where the accident occurred is about one-half mile and for this distance the road runs in a northeasterly direction about ten rods east of north. The Barney Miller curve is a long gradual curve. The concrete slab is eighteen feet wide with a black line in the center and is banked so that it is about eight inches higher on the outer side than on the inner side of the curve. From the point where the slab starts to curve to the point of termination where it runs east is about 300 yards. Adjoining the outer edge of the slab is a

dirt shoulder which is about level with the slab and which was on that night a little damp. A pile of cinders four to six feet in diameter, which before the accident was from two to three feet high, was located near the east end of the curve about two feet from the outer edge of the slab. It is the contention of plaintiff in error that when approaching the point where the accident occurred he felt his car drawing to the left and he was unable to pull it back in position on the slab on which he was authorized to travel. The left wheels of the car went off the slab at a distance from the pile of cinders variously estimated from fifteen to thirty feet. The point where the wheels left the cement was about three-fourths of the way around the curve in question. The plaintiff in error says he did not see the pile of cinders in time to avoid striking them and the automobile ran over the cinders, turned over, three the occupants from the car and came to a stop in a ditch about five feet north of the north edge of the concrete, headed in an easterly direction. Defendant in effor's intestate died as a result of the injuries received in the accident.

It is insisted by the plaintiff in error that after the accident the tire on the left from wheel was flat; that the other three tires carried the usual pressure; that the left from tire had a break about two inches long on the side of the casing; and that the edge of the fabric near the break was pulled apart showing that it was a break rather than a cut. The fabric was not torn at any other point than this two inch break.

A number of reasons are assigned and argued by the plaintiff in error for a reversal of the judgment.

It will be observed that the first, third and fourth counts of the declaration charged common law negligence. The second count charges that the plaintiff in error wilfully, wantonly and recklessly drove, managed, operated and controlled his said automobile at the time and place as averred and that the

said automobile, by reason of the wilful and wanton conduct of the plaintiff in error left the concrete pavement and violently turned over, etc.

The verdict returned by the jury was a general one. A special interrogatory was also submitted by the court to the jury, under the second count, which was as follows:

> "Did the defendant wantonly and wilfully propel and operate his said automobile in such a manner as an approximate result thereof Helen Gray Pierson was injured, from which injury she died as alleged in the second count of plaintiff's declaration?"

The jury returned a verdict finding the plaintiff in error guilty, assessing the damages at $5,000. and answering the special interrogatory as follows:

> "We, the jury, find the defendant did wantonly and wilfully propel and operate his said automobile in such a manner that as an approximate result thereof Helen Gray Pierson was injured, from which injury she died as alleged in the second count of plaintiff's declaration."

We will refrain from discussing the evidence owing to the conclusion we have reached.

It is insisted that the court erred in giving instruction Twenty-eight on the part of the defendant in error. This instruction is as follows:

> "The court instructs the jury that at the time of the alleged accident there was then and there in force a certain statute of the State of Illinois which is as follows: 'No person shall drive a vehicle of the First Division as described in Section Two of this Act upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle or motor bicycle of said First Division operated on any public highway in this State * * * * outside of the limits of an incorporated city, two or village * * * exceeds thirty-five miles an hour, such rate of speed shall be prima facie evidence that the person operating such motor vehicle or motor bicycle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person.'"

said automobile, by reason of the failure of the service connected
of the plaintiff in error just as effectively preventing the violently
turned over, etc.

The verdict returned in the jury was a general one.

A special interrogatory was also submitted by the court to the
jury, under the second count, which was as follows:

"Was the plaintiff guilty of contributory negligence in the manner
and operating the car which you find?"

The jury returned a verdict finding the plaintiff guilty of contributory
negligence, the effect of which was to absolve the defendant
from liability.

Twenty-eight of the acts of the defendant in error [illegible]
tion is as follows:

We will consider these assignments of error [illegible]
the complaint we may consider.

It is [illegible]

In Crawford vs. Cahalan, 259 Ill. App. 14, at page 19, we said: "An instruction was also given which stated that the driver of an automobile on a public highway outside the limits of an incorporated city, town or village, at a rate of speed in excess of thirty-five miles an hour, is prima facie evidence that the driver was operating his automobile at a rate of speed greater than was reasonable and proper having regard to the traffic and the use of the way, etc. Notwithstanding there was some testimony tending to show the defendant was driving at a greater rate of speed than thirty-five miles an hour, still there was also evidence tending to rebut negligence on his part. Since the case of Johnson v. Pendergast, 308 Ill. 255, was decided by the Supreme Court there have been numerous decisions holding that where there is any testimony tending to rebut a charge of negligence it is error for the court to instruct concerning what constitutes prima facie evidence. It then becomes a question for the jury to decide what is a reasonable and proper speed in the meaning of the statute," Owing to the rule announced it was error to give instruction No. Twenty-eight.

We are not prepared to say, as contended for by the plaintiff in error, that the court erred in refusing the peremptory instructions offered by the defendant in error, especially as to the First, Third and Fourth counts.

We conclude, therefore, that the judgment of the Circuit Court of Warren County should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8397

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 6204

BE IT REMEMBERED, that afterwards, to-wit: On MAY 13 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8397 Ag. No. 3

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1932

Rettig-Stamm-Gruen, Inc.,
a corporation,
Appellant,
vs.
Roy Yeoman, doing business
as Henderson Jewelry Co.,
Appellee.

Appeal from Circuit Court
of Lake County.

BALDWIN, J:

Appellant, hereinafter called plaintiff, started suit in the Circuit Court of Lake County against appellee, hereinafter called defendant, to recover $5,489.85 for watches, jewelry, etc., claimed to have been sold and delivered by plaintiff to defendant.

Plaintiff filed the common counts and an account stated.

The action on the account stated was based on conversations had and letters written between the parties. To this defendant filed a general issue and an affidavit of merits. At the time of the trial the plaintiff withdrew all the counts, except the one declaring upon the account stated and that presented as the sole and only issue for trial as to whether or not there was an account stated between the parties.

A general verdict was rendered by the jury finding defendant not guilty, and also a special interrogatory was answered "no" upon the question as to whether or not there was an account stated between the parties in the sum of $5,489.85. A motion for a new trial and in arrest of judgment were overruled. Judgment was entered on the verdict and an appeal was taken to this Court.

It appears from the record that the goods were sold to defendant during the period from May, 1929 to September,

1929 and that at the time of commencing suit there was due the plaintiff, as per statement, the above mentioned sum. No evidence was offered by the plaintiff to prove the items of account, but plaintiff relied solely upon an account stated.

The evidence shows that on August 1st, 1930, plaintiff wrote defendant a letter, which was received in evidence as plaintiff's Exhibit 1, in which plaintiff called attention to defendant that his account showed a balance due of the above amount which was way past due and asked him to do something about it. To which letter defendant replied, known as plaintiff's Exhibit 2, stating that he had received the letter of August 1st; that he had received a previous letter, July 23rd, and in reply to the previous letter had asked if he could return part of the merchandise and give notes for the balance, stating that business conditions were not good and that he was willing to work with plaintiff in any way he could.

In September, 1930, the account remaining unpaid, one Rettig and a Mr. Stamm, representatives of plaintiff, called on defendant at his place of business in Waukegan and presented defendant with a statement of his account showing a balance due of $5,489.85,and asked for payment of same. To which the defendant said, "I can't do anything about it," and Rettig said, "Well, you admit you owe this account?" To which defendant replied, "Oh, yes, no dispute on the matter of the account at all, it is just simply a matter of having bad business and I simply can't pay it." At this time, witness Rettig said to defendant, "You admit it is an old account, very old, and should have been paid a long time ago, six or eight months before," and defendant replied, "I know it is and I don't know what to do about it."

Subsequent to this meeting, under date of September 6th, a letter enclosing another statement showing the balance due as aforesaid was sent to defendant which stated that it in-

cluded a statement showing the balance due and asked for a remittance. This was known as plaintiff's Exhibit 3. And under date of September 12th, defendant wrote plaintiff's exhibit 4, in which he acknowledged receipt of the September 6th letter, stating that conditions were about the same; that he was going to try and get some money from his brother and from his wife's people and that he would do the best he could. To meet this issue defendant denied that he had promised to pay the account and that there was no dispute; that defendant and one Henderson were in partnership and defendant, with reference to the September conversation with Rettig, stated that he, the defendant, didn't know the exact amount of the account, but knew that Rettig was there about that time and had a talk with him and the main issue was whether the defendant could give the plaintiff any money or not. In his direct examination he was asked various questions, among which the following is typical: "Q. At that time did you know whether or not the amount he (Rettig) was demanding gave you credit for a trade discount known in the jewelry trade as a 10-6 discount? A. No, sir."

Witness Henderson for defendant testified that defendant and himself were partners in the business, although this issue was not raised by the pleadings. Henderson testified that he had conducted negotiations with plaintiff out of which the account arose and that the statement sued on did not give credit to the defendant of a trade discount of 10 and 6.

Questions were asked defendant with reference to some alleged credits represented by certain checks, but no checks were offered in evidence and there was no evidence offered as to what the trade discount was or amounted to.

The defendant attempted to interpose the defense of mistake, but the alleged defense was based upon incompetent testimony offered in his behalf and which should not have been

admitted in the form in which it was offered, it consisting of leading questions and questions calling for conclusions upon material matters of alleged defense.

As we view this case, stripped of the incompetent testimony as we have pointed out, this record shows that plaintiff advised defendant of the account due and urged its payment both in conversations and in correspondence hereinbefore referred to. Defendant attempts to deny the conversations or the affect of them, and upon this question there is more or less of a dispute, but in our opinion the correspondence introduced in evidence corroborates plaintiff's versions of its theory of this case.

In the case of Dean & Son v. W.B. Conkey Co., 180 Ill. App. 162, is found a full discussion of an action on an account stated, giving a definition of the account stated and of the proceedure which should obtain in such cases and upon this authority the Court should have governed the proceedure in the instant case in accordance with the views expressed herein and this case, together with the authorities cited therein, amply support, as the law of the state, the following proposition:

"Where an account is rendered by one party to another and is retained by the latter beyond a reasonable time without objection, this constitutes a recognition by the latter of the correctness of the account and establishes an account stated,*** An account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties.*** It is deemed conclusive both at law and in equity unless impeached for mistakes or fraud.*** The defense to an action upon an account stated must relate to it and not to matters of anterior liability, except in so far as they constitute a foundation for the introduction of evidence to the real substantial defense impeaching the settlement for fraud, error, or mistake.*** The burden of proof is upon the party seeking to open an account stated for

fraud, omission or mistake and such defense must be clearly shown," citing State vs. Illinois Central Railroad Company, 246 Ill. 188.

In Dick vs. Zimmerman, 207 Ill. 636, it is said, "In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of an account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained."

In the instant case, goods were sold in May to September of 1929 and the account remained unpaid until August, 1930, when the plaintiff sent defendant a letter enclosing the account and asking for payment, to which defendant replied asking permission to return some of the goods and to give his note for the balance. Then, in September, representatives of plaintiff had a conversation with defendant, portions of this conversation were denied by defendant and his witness, Henderson, but again in the month of September plaintiff wrote defendant enclosing another statement of the account and asked for payment, and defendant replied that he was endeavoring to raise the money and would do the best he could. The conversations offered in evidence between plaintiff and defendant alleged to have occurred in September, are in part denied, but we think that the correspondence and the portions of the conversations relied on corroborate each other and support the theory of plaintiff and especially is this true if the objectionable portions of the testimony offered by defendant as we have heretofore pointed out, are eliminated from this record.

The defendant had the burden of proof to establish fraud or mistake in connection with the account stated and this, the record, purged of its incompetent portions, fails to

satisfactorily demonstrate. Wurlitzer vs. Dickinson, 153 Ill. App. 36.

There was injected into this record, improperly as we think, the question of the partnership between defendant and one Henderson.

No such issue was raised by the pleadings and such testimony was therefore inadmissible upon this trial. Cohen vs. Toy Gun Mfg. Co. 170 Ill. App. 611.

Complaint is also made that the court allowed defendant's counsel to make unwarranted, misleading and prejudicial statements in his argument although objections were made to them in ample time.

We have read these objected to statements of counsel in his argument as shown by the record and are convinced that such objected to statements of counsel were improper, misleading and prejudicial to plaintiff. The objection should have been sustained and counsel rebuked.

For the reasons herein given the judgment of the Circuit Court of Lake County is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8418

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: On MAY 13 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8418 Ag. No. 6

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1932.

The LaSalle National Bank,
a Banking corporation,
Appellee,

vs.

Appeal from Circuit Court,
LaSalle County.

Matt Knauf and O. C. Yoder,
(O. C. Yoder,
Appellant)

BALDWIN, J:

This is an appeal by O. C. Yoder, appellant, from a judgment of the Circuit Court of LaSalle County in an action instituted by a confession of judgment upon a promissory note with power of attorney, in favor of the LaSalle Bank against Matt Knauf and O. C. Yoder in the sum of $1526.25, together with costs of suit.

On motion of appellant in the Circuit Court, the judgment was opened and leave given appellant to plead. Plea of the general issue was filed by the appellant and notice of special defense was given which among other things set forth that appellant was a surety upon said note and received no consideration for the signing of the same; that the signature of the appellant Yoder was procured as surety to the note with the understanding that the principal maker, Knauf, would be loaned by said Bank the principal amount of said note for the purpose of purchasing certain new automobiles to be sold by said Knauf in his business then being carried on in the City of LaSalle, Illinois; that after said note was executed and delivered to said bank, the bank applied the note upon former indebtedness owed by Matt Knauf & Co. to said bank and

Sup. Ct. U. S.

Sup. No. 918

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1917

Supreme Court, U. S.
FILED
JAN 28 1918
JAMES D. MAHER
CLERK

The Pacific National Bank,
a banking corporation,
Appellant,

vs.

Mott Smart and D. C. Taylor,
(O. C. Yoder,
Appellant).

BALDWIN, J.:

This is an appeal by [illegible], Appellant, from a judgment of the District Court of Douglas County, Oregon, instituted by a confession of judgment upon a promissory note with power of attorney, in favor of the Pacific Iron Company, Mott Smart and D. C. Yoder to the sum of $[illegible], together with costs of suit.

On motion of Appellant it was dismissed, the judgment was opened and leave given respondent to plead. Plea of the general issue was filed by the appellant and notice of special evidence was given which under Oregon law [illegible] that appellant was a wholly [illegible] and received no consideration for the [illegible] of the note; that the [illegible] of the appellant [illegible] was insolvent, it [illegible] with the [illegible] that the [illegible] be issued by said bank the [illegible] the purpose of [illegible] by said Smart in his business [illegible] in the City of Salem, Oregon; that after [illegible] and delivered to said bank, the [illegible] former transactions [illegible]

failed and refused to comply with the aforesaid agreement; that the appellee shortly after receiving said note took possession of the property of said Matt Knauf & Co., consisting of automobiles, etc., and entered judgment upon the note for the purpose of collecting the same on pre-existing indebtedness of said Matt Knauf & Co., all in violation of the rights of appellant, as surety, whereby he became and was released from all liability as surety.

After the joining of issue a jury was waived and the cause submitted to the court and judgment was rendered in favor of appellee for said sum of $1526.25. The original amount for which judgment was confessed was $100.00 in excess of that amount, and the original judgment, on motion, being reduced $100.00, being the amount allowed as attorney's fees, and the appellant Yoder prosecutes this appeal.

The contention of appellant for reversal of the judgment is based upon the grounds set forth and stated in the special notice of defense.

It appears that Matt Knauf was engaged in the general automobile business including the purchase and sale of motor vehicles. The business was conducted under the name of Matt Knauf & Co. and at the time of the transaction in question, all of the capital stock of the company was owned by Matt Knauf, his wife and his daughter.

It appears that for a number of years Knauf financed the purchase of cars through the LaSalle National Bank. Cars purchased by him were shipped to Knauf under draft with bill of lading, etc. The amount paid by Knauf for the cars was then advanced by the bank and the car or cars purchased were pledged by Knauf to the bank as security for the amount so advanced. It was the agreement between the parties that as the cars were sold application of the sale price equal to the amount advanced by the

bank would be turned over to the bank by Knauf and by the bank applied upon the indebtedness to it. The bank at regular intervals would make inspection and ascertain the number of cars in the possession of Knauf for the purpose of ascertaining whether or not he had in his possession cars pledged as security for the loans made in the purchase of the same. It appears that inspection of the cars in possession of Knauf & Company was made by a representative of the bank of June 11, 1928, at which time there were six cars pledged to the Bank by Knauf & Company to secure an indebtedness aggregating $7,034.70. The inspection on said last mentioned date revealed that instead of having six cars on hand there was but one car. At that time the bank representative was informed that the five missing cars were out for demonstration purposes or with a sub agent of said Knauf & Co. doing business at Spring Valley. It proved on inspection and investigation that this was not the truth and the record discloses that there was no dispute as to this fact. At or about the time of the discovery by the bank of the dishonesty of Knaufs' certain payments were made upon the indebtedness and certain negotiations had been had.

It appears that on July 6, 1928 the total indebtedness remaining of Matt Knauf and Matt Knauf & Co. to the bank aggregated $5,535.05.

On account of the condition in which Knauf found himself by reason of his practicing a fraud upon the appellee the bank advised him that it would be necessary to take over his business. Knauf insisted he had a friend that would help him, but it developed he did not receive help from his friend. An arrangement was entered into by which the bank, at the suggestion of Knauf, agreed that the bank would continue to finance him on the purchase of new cars and permit him to continue in business

on his own account and he would replace the notes then held by the bank with notes secured by other signers. At the suggestion of Knauf the bank prepared three notes to cover the then indebtedness. One of the notes was for $1000, one for $1500 and one for $3035.05. The aggregate amount of all was $5535.05, the exact amount of the then indebtedness. These notes as prepared by the bank were taken by Knauf and returned by him shortly thereafter. The $1500 note, the one involved in this controversy was signed by Matt Knauf and O. C. Yoder, the appellant herein. The other notes that were given by Knauf were also returned by him signed by Knauf and other securities. Upon delivery of these three notes to the bank the notes then in possession of the bank were canceled and the bank returned the old notes to Knauf and in carrying out the agreement with Knauf, on July 6th, the date of Knauf's proposal, the bank financed for Knauf new cars purchased in the sum of $2615.00 and again on July 11th financed the purchase of a new car in the sum of $1358.65.

Knauf failed to secure the financial assistance that he informed the bank he thought he would be able to secure and his financial condition being much worse than represented, his business shortly thereafter collapsed and the bank had to repossess itself of the new cars purchased and eventually entered judgment upon the three notes referred to.

The record discloses that there was no communication had between O. C. Yoder and the bank relative to the signing of the note by him until after matters became critical. The business of Knauf had again reached a serious stage.

The principal defense relied upon by appellant is such as set up in his notice of special defense in addition to the plea of the general issue. The contention is made by

the appellant that no consideration was received by him for the signing of the note in question and for that reason the appellant is not liable on the note. This position is attempted to be sustained by the appellant by accepting the testimony of Knauf relative to the conversations and transactions which took place between them and the bank prior to the time the note in question was signed by O. C. Yoder. This contention is that the bank through fraud secured the note with Yoder as a surety upon representations to Knauf that the note was to be used for securing new money and not for the purpose of securing a pre-existing indebtedness and as a forebearance from taking over the business of Knauf and Company, which business was owned solely by the Knaufs.

With the contention of appellant herein that there was no consideration for the note which he signed with Knauf, we cannot agree.

Knauf owed the bank $5,535.05. His nefarious conduct in not living up to his agreement with the bank who had trusted him, had been disclosed to the bank and appellee was considering ways and means of protecting itself, which included the possible taking over of the business of appellant and running it in an endeavor to get its money therefrom; Knauf claimed to have customers for new cars which he could not satisfy until he had purchased his quota of cars under his contract and he was anxious to get money or to be financed so he could satisfy these prospective customers; Appellant then, in lieu of the bank taking over the business and in an effort to extricate himself from his financial difficulties, went to the bank and asked if he gave new notes with good security thereon, would that be satisfactory and would the bank allow him to continue his business and help him finance the purchase of new cars? He was told that would be satisfactory. He

then asked for the notes, three of them, due at different dates and for different amounts, the total, however, curiously enough, being exactly the amount of his past due indebtedness to appellee, and upon receiving these notes went out and secured three respective endorsers on the respective notes and delivered the notes thus signed to the bank and the bank accepted them and gave him credit upon the books accordingly.

These new notes operated as payment for the old notes and they became null and void. There is some discrepancy in the testimony as to whether the old notes were sent to Knauf, but we regard that as immaterial for their usefulness and validity were at an end (Trego v. Estate of Cunningham 267 Ill. 367, and cases cited).

We are of the opinion that the agreement of the appellee to forebear taking over the business and its willingness to accept new notes for the old ones and to refinance the purchase of additional cars for Knauf was a sufficient consideration upon which to predicate the promise of appellant to pay the notes sued upon. True it is, this consideration was extended to Knauf, the principal debtor, and not to appellant, but it is the law of this State that a valuable consideration passing from certain makers to other makers, resulting in the execution of a note, is sufficient to sustain it and it is not essential that the surety thereon shall directly receive the consideration. (Steward v. Weisenmayer 202 Ill. App. 338; McHard v. Ives 5 Ill. App. 400; Crofut v. Aldrich 54 Ill. App. 541.)

It is charged by appellant that appellee should have communicated with him and acquainted him with the details of its arrangement with Knauf before it took the paper with his name thereon. As we view it, such a course of conduct is not laid by law upon appellee. All it had to do was to place itself within the provisions of Section 72 of Chapter 98 of the

Statutes of the State of Illinois, Cahill, 1951, which section defines who is a holder of negotiable paper in due course and we believe this record discloses that appellee came within the definition as therein laid down.

Knauf, who had perpetrated a fraud upon appellee, when he sold cars and did not faithfully account for them as he had agreed, may have fraudulently represented to appellant the purposes for which he desired to use the money he claimed he could get on the note he was asking appellant to sign; but if he did, this record is silent as to any knowledge of the bank of any such misrepresentations so made prior to said note coming into its hands in due course.

Appellant, who signed the note, in order to protect himself should have inquired of the bank as to the use that was to be made of this paper before he signed it and delivered it to Knauf and thus made it possible to get into the hands of an innocent holder for value before maturity. Such would have been the conduct of a reasonably prudent man under similar circumstances.

In Anderson vs. Barne 71 Ill. 20, quoting from the syllabus, which is borne out by the opinion, it is said:

> "Although the execution of a promissory note may be procured as to a surety by the fraud of the principal maker, if the payee is an innocent party, and has no knowledge of the facts, and is not privy to the fraud, this will afford no defense against the note."

Continuing:

> "The rule of law is, where one of two persons must suffer loss, he who by his negligent conduct made it possible for the loss to occur, must bear it. It is the duty of a party signing a promissory note, to use reasonable and ordinary precaution to avoid imposition, and if he does not, an innocent party should not suffer loss for his want of care."

The trial Judge heard this case, saw the witnesses as they testified and as they appeared before him on the trial, he

weighed their testimony and tested their credibility by the well known and established rules concerning the reception of evidence in the trial of a case and judging from the decision rendered below we are of the opinion that he gave weight to the testimony that merited the same and attributed credibility to the witnesses that deserved it.

We have examined the record carefully and we are clearly of the opinion that the three notes in question, including the note of the appellant, Yoder, were given to take care of the pre-existing indebtedness of Knauf to the appellee bank; that there was no failure of consideration; that appellant is clearly liable upon the note as is disclosed by the evidence in this record and that appellee bank had no knowledge that appellant had been informed by Knauf at the time he executed the note that the money to be received thereon was to be obtained for the purpose of carrying on the business instead of paying the indebtedness of Knauf and, therefore, would not be binding upon the appellee bank.

Complaint is made that the Court did not hold propositions of law and fact as requested by appellant.

We are of the opinion that the series of propositions of law and fact held by the court substantially state the law governing this case and in accordance with the view we take of it and no error was committed, either in the holding or in the refusal to hold propositions submitted to it.

We are of the opinion that the judgment of the Circuit Court of LaSalle County was right and it is therefore affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8442

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: On MAY 13 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8442 Ag. No. 9

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1952

The Joliet National Bank,
a Banking corporation,
Appellee

vs.

Appeal from the Circuit Court
of Will County.

William O. Bates,
Appellant.

BALDWIN, J:

The Joliet National Bank brought this suit against William O. Bates in the Circuit Court of Will County to recover on a certain promissory judgment note alleged to have been executed and delivered by appellant to appellee under date of January 26, 1924 in the principal sum of $20,000.

On January 27, 1930, a judgment was confessed against the appellant and in favor of appellee in the sum of $21,633.86. The declaration and cognovit on which the judgment was confessed, were in the usual form with affidavit of claim attached. The record discloses that on motion of appellant supported by affidavits, the judgment was opened and appellant was granted leave to plead. By virtue of the leave being granted the appellant pleaded the general issue and two special pleas together with an affidavit of merits. The defense relied upon by the appellant by virtue of the special pleas, is to the effect that the note sued on was without consideration and void, the averments being that the supposed promissory note in the aforesaid declaration of appellee mentioned was made, executed and delivered by appellant to appellee to evidence a certain previously paid and discharged indebtedness represented by two certain promissory notes theretofore paid in full, satisfied and discharged, said notes being in

the principal amount of ten thousand dollars each and executed by the Bates Machine & Tractor Company, a corporation, to evidence a certain obligation of the said Bates Machine & Tractor Company and also executed by the appellant as accomodation, joint maker and signer, which said two notes were payable to said appellee, one of which was dated March 16, 1923 and due July 16, 1923, and the other of said notes was dated June 21, 1923 and due October 21, 1923, and each bearing interest at the rate of six per cent per annum after maturity; that said two notes were and had been long prior to the date of said supposed note mentioned in appellee's said declaration fully paid, satisfied and discharged by the delivery to appellee, pursuant to agreement between appellee and the said Bates Machine & Tractor Company and the appellant, and divers other persons of twenty thousand dollars face value of first mortgage real estate gold bonds of said Bates Machine & Tractor Company, secured by trust deed dated April 1, 1923, said bonds maturing October 1, 1924, and the issue of said bonds being a total aggregate amount of five hundred thousand dollars, and that said twenty thousand dollars, face value of said bonds, the plaintiff then and there accepted in full payment, satisfaction of said two promissory notes aforesaid.

To the special pleas appellee's replied that none of the twenty thousand dollars face value of first mortgage real estate gold bonds of the Bates Machine & Tractor Company, which are in the said second plea referred to, were ever accepted by appellee in full payment, satisfaction and discharge, of both or either of the two promissory notes that are in said second plea described,*** wherefore the appellee says that the promissory note which is mentioned in the declaration was made, executed and delivered by the appellant to the plaintiff to continue in effect a prior indebtedness of the appellant for money previously loaned by appellee at the special instance and request of appellant and

evidenced by the two herein last above designated promissory notes, no part of which was ever paid except in or to the extent of the four thousand five hundred seven dollars and seventy cents that is credited as a payment on the back of the appellant's said twenty thousand dollar note which is declared upon in appellee's declaration.

After the joining of issue, a jury was waived and the cause was submitted to the court without the intervention of a jury.

It was stipulated between the parties to the effect that any competent evidence proper under any pleading which could properly be filed by either party should be received and considered on the trial of the cause.

The record discloses that on the 28th day of May, 1931, the court entered finding and judgment in favor of appellee and against appellant in the amount of $19,285.38, with costs, from which finding and judgment this appeal is prosecuted by appellant.

It appears that the indebtedness in question was contracted in 1922, when appellee loaned twenty thousand dollars to the Bates Company at the request of appellant. This transaction was already evidenced by two ten thousand dollar notes which were renewed from time to time until one bore date March 16, 1923 and the other June 21, 1923; that the notes were signed by the company and the appellant individually; that every time he signed the notes at the appellee bank the president insisted that appellant sign as a co-maker, "beginning with the original one and continuing down to the note on which judgment was taken."

Appellant was vitally interested in the Bates Machine & Tractor Company as shown by the record. He had invested something like forty-two thousand dollars in the same and throughout its existence was president and treasurer thereof. It further appears that in the Spring of 1923 the company owed nearly four

hundred thousand dollars to a number of Chicago banks. As a result these institutions adopted a plan to extend all of the company's indebtedness by means of a five hundred thousand dollar bond issue. This took place at a meeting held in Chicago On April 30, 1923, which was not attended by a representative of the appellee bank.

It further appears that the appellee bank did not become a party to the bond issue until some time in July, 1923, and then only on the expressed condition that appellant would allow appellee to continue to hold notes bearing his personal signature to protect appellee against any loss in event the bonds did not pay the full amount due appellee.

It is the contention of appellee in conformity with this understanding, appellant left with appellee the note of March 6, 1923 and of June 21, 1923 whereupon appellee accepted the Bates Machine & Tractor Company Bonds having a face value of twenty thousand dollars. The evidence shows that the notes remained in appellee's possession until September 26, 1923, when appellant executed a new note of that date for the principal sum of Twenty thousand dollars due four months thereafter. Appellant affixed the corporate name thereon in addition to his individual signature and stated that he wanted the company's name on the note so that if he had to pay any money on it he could show the Board of Directors that it was not his private money. The last mentioned note was renewed on its due date. The Bates Company was placed in voluntary bankruptcy in March, 1924, and appellant filed the petition as president and secretary of the corporation; that as a result appellee realized $4,507.70 on the bonds received from appellant.

It is quite complicated in the testimony as to what the arrangement was between Remond, president of appellee bank, and the appellant at the time the bonds for $20,000 were delivered to the appellee bank.

It is the contention of appellant that appellee accepted the said twenty thousand dollars face value bonds in full payment, satisfaction and discharge of the indebtedness evidenced by the original indebtedness to the bank by the company joined in by appellant. In other words, appellant contends that the notes which originally evidenced the indebtedness in question were paid on July 17, 1923 by the delivery to the appellee of bonds of the Bates Company, having a face value of twenty thousand dollars.

It is conceded that this presents a question of fact and that the intention of the parties is controlling.

Much is said in the arguments by the respective parties concerning the delivery to appellee of the Bates Company bonds, having a face value of twenty thousand dollars. The appellee contends that the bonds were received with the understanding with Bates, the appellant, that the bank should retain the original note evidencing the indebtedness of the company on which appeared the name of Bates, and that they accepted the bonds in full payment of the note, and would give credit on the notes, the amount realized on the bonds. As to what the understanding was on this question the testimony of the president of appellee bank and of Bates is not harmonious. The president of the bank insisted that he accepted the bonds at the suggestion of Bates in order that he might carry the bond issue through and that he was to keep the note. Bates testified to the contrary.

On this question and in connection with the testimony of these two parties the court had a right to take into consideration any facts or circumstances as disclosed by the record bearing upon their respective contentions. The court has found in favor of the appellees in that regard. Appellant contends that a composition was attempted on April 30, 1923, at the meeting held in Chicago, which was attended by representatives of a number

of creditors, but not by appellee. It appears that at that meeting it was agreed that the only way to keep the Bates Company from going into bankruptcy was for the creditors to get together and extend the indebtedness.

It is contended by appellant, First, that the note sued on was given to evidence a previously paid and extinguished indebtedness and as such was without consideration and void. Second, the note sued on was procured by appellee in violation of a composition agreement entered into between appellee and other creditors of the Bates Machine & Tractor Company and as such was fraudulent contrary to public policy and void. Third, that appellee's theory that the note sued on was given as collateral security for bonds of the Bates Company held by appellee, said bonds being thereafter surrendered as part of the consideration for assets and properties of the Bates Company and by such surrender appellee lost all right in the collateral securing the same and could not thereafter maintain suit.

It seems that this case presents for determination the question as to whether the President of a corporation, who has signed a promissory note to evidence a corporate loan, can make an enforcible contract whereunder he is to remain personally liable for any loss which the payee may sustain by ascertaining the indebtedness through an acceptance of later maturing bonds.

Upon the first contention of appellant there is no doubt but that this depends upon the facts and that the intention of the parties to the transactions is controlling.

At or about the time the bonds were delivered to appellee by appellant there were several conversations between them and there is some variance between the stories related by each of them. Appellee contends that he would only accept the bonds provided the notes representing the indebtedness of the company and secured by the personal signature of appellant be retained by him

to cover any loss that might ensue, and appellee contends that such an agreement was never entered into between them.

The record is voluminous, but it is significant that appellant permitted the appellee to retain the two ten-thousand dollar promissory notes signed by him as co-maker after the indebtedness of the principal debtor was, as he claimed, paid in full, and in addition to this, he subsequently renewed his individual liability by a twenty-thousand dollar note dated September 26, 1923 and by another of like import executed on January 26, 1924. Further, when the Bates Company was thrown into bankruptcy upon the application of appellant, schedules filed on February 27, 1924, describe the note in question as being then outstanding as collateral security for the bonds in controversy and, further, appellee had possession on the hearing of the last note with the inference resulting therefrom that the same was then an existing liability.

The Statute upon the point as stated in the last observation raises a presumption that every negotiable instrument is deemed prima facia to have been issued for a valuable consideration, and that every person whose signature appears thereon has become a party thereto for value. (See Section 44, Chapter 98, Smith-Hurd Revised Statute 1931,) and that doctrine places the burden of proof upon appellant and requires him to establish his contention that the indebtedness is paid and that the note was given without consideration. American National Bank vs. Woolard, 342 Ill. 148. After carefully reading the record upon this point, we are of the opinion that this contention of appellant is not sustained by the proof. We think the evidence shows that appellee originally loaned the $20,000 to the Bates Company at the request of appellant and required appellant to individually sign ever note therefore beginning with the first one and continuing down to the note in question here.

Appellant claims that he signed the note as an accomodation co-maker, but that does not relieve him for the Statute makes him liable as maker, notwithstanding the maker knew him to be an accomodation party. Section 29, Chapter 98 Smith-Hurd Illinois Revised Statutes 1931.

The note in question grew out of an original loan at which time appellee delivered to the Bates Company $20,000 and it was for an antecedent or a pre-existing claim and was a sufficient consideration for the execution of the notes in question. Appellant contends that the notes which originally evidenced the indebtedness in question were paid in full on July 17, 1923 by delivery to appellee of the bonds having a face value of $20,000.

This also presents a question of fact. We have examined the record upon this question and have come to the conclusion that the effect of the conversation between the parties hereto and the written documents offered in evidence do not sustain the contention of appellant.

The question comes up frequently, in our consideration of this matter, as to why, if appellant's contention is correct, did he renew his individual obligation as late as January 26, 1924, that date being after the bonds had been delivered to appellee as alleged payment in full of the obligation here sued upon?

Appellant contends that there was a composition with creditors, at which time the creditors agreed to take the bonds of the company in payment of its debts and that later, having accepted the benefits of the composition, appellee is estopped from recovering in the case at bar. Three or four witnesses were called by appellant to sustain this contention, together with the documentary evidence upon the point, but so far as we can see from this record, the position of appellee that he never, at any time, agreed to surrender this individual security of appellant, has not been overcome by satisfactory proof. Much

testimony was offered on this point and was carefully considered.

In our opinion, and it was the trial Judges' also, the alleged composition at the most was only an extension of the time of payment of the debts of the Bates Company. It was the substitution of one promise for another. Pitt Sons Mfg. Co. vs Commercial National Bank 121 Ill. at 589. The supposed composition did not require any party thereto, to surrender any other security had for the payment of the debt, and such security, if any, could be retained and realized upon at its convenience. Merchants & Farmers State Bank vs Sheridan 156 Ill. App. 25-30.

Appellee's contention on this point, which we think is supported by the record, was that it had appellant's personal obligation on the notes and that would not be released and appellant being very anxious to have the plan go through finally assented thereto and later renewed these very notes thereby, to our minds, recognizing and ratifying this view of this phase of the litigation.

Appellee had the right to impose conditions upon which it would accept the bonds tendered and if it did, as in this case, demand and receive and held additional security (the personal security of appellant upon the notes of the Bates Company whose debt was being adjusted,) before it accepted the bonds no one can complain, for no creditor of the Bates Company was injured thereby. Other creditors' actions in this matter were not influenced by appellee and it was not encumbent upon appellee, under the circumstances, to disclose to any one what had been done in that regard. Lobdell vs. State Bank of Nauvoo 180 Ill. at 59. Indeed it appears to us that if anyone owed a duty to the other creditors of the Bates Company to disclose what had been done, appellant himself was the one, and he cannot be heard to complain here of the failure of appellee in that respect. Hefter vs. Cahn 75 Ill. 296 is cited by appellant as authority on this question and the point that such additional security was void as against public policy, but we cannot concur in this contention. Appellee was

the last one to accept the bonds and no one was injured or influenced by its action. The Hefter case was discussed and distinguished in the Lobdell case supra. Upon this phase we refer generally to 8 Cyc. 452.

We are not unmindful that whatever the agreement was between these parties was a question of fact to be determined by the Court and the trial court made a finding thereon in opposition to the contention of the appellant and in this we concur.

Appellant contends that, having subsequently surrendered its bonds to the trustee in bankruptcy in exchange for its assets, appellee thereby parted with all interest in the bonds and in consequence lost all right to the collateral, that being the note sued on. This, too, presents a question of fact and, as did the trial judge, we cannot agree with the view of appellant on this point.

We are of the opinion that the record discloses that appellant agreed to allow the bank to continue to hold notes bearing his personal obligation which would stand between the bank and any loss it might sustain in the transaction and that these notes were retained by appellee until September 26, 1923, when appellant executed a new $20,000 note, due four months thereafter, in exactly the same form as the previous notes for which the later note was given, and that later this last note just mentioned was renewed in January of 1924 and is the note in question. Such being the case, these notes were transfers of personal property as security for a debt or other obligation. 31 Cyc. 785-791-793.

Appellant caused the Bates Company to become a voluntary bankrupt in March of 1924 and it was necessary for the bondholders to get together and protect themselves, which they did, and they made a proposition to the bankruptcy court which was approved and consummated and appellee exercised his option and took a pro-rata share of cash for such bonds as it held under that agreement. This,

appellee had a perfect right to do.

In addition to the debt of the Bates Company he also had a valid agreement with appellant to make good any loss appellee sustained in the transaction. It was not necessary for appellee to take any steps to prove his claim where the surety did not demand it. Upon this phase of the case we again concur in the holding of the trial judge that this contention of appellant is not sustained by the record.

It will, therefore, be observed that all of the issues involved in this case involve questions of fact and it was peculiarly the province of the court to adjudicate them in the first instance for the doctrine obtains in this State that where the evidence is conflicting, the Court, or jury, who sees the witnesses and hears them testify, is better qualified to judge their credibility and the weight such testimony should carry than is a court of review, and in such cases the finding of the trial court will not be disturbed unless it is clearly manifest that palpable error has been committed.

This is an exceedingly voluminous record, many questions are discussed and many decisions of courts of last resort, as well as text books, are cited for consideration. The arguments are lengthy and involved and in view of the fact that the issues were submitted to the court without the intervention of a jury and that it has made its finding on these questions of fact; from an exhaustive examination of the record, we are not prepared to say that the conclusion reached by it is contrary to the manifest weight of the evidence.

There is no serious error so far as we have been able to see and we conclude, therefore, that the judgment should be affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8470

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 13 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8470 Ag. No. 12

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1932.

In Re Estate of Thomas F. Painter, deceased, Armor Moreland, Executor (Objector)
Appellant.

Appeal from the Circuit Court of Knox County.

BALDWIN, J:

This case comes to this Court on an appeal from the Circuit Court of Knox County, Illinois, and involves the question of whether or not Lodema Alice Painter, appellee, is entitled to a widow's award as such widow of Thomas F. Painter, deceased, in the sum of $2000.

The question raised upon this record and upon which it is presented to this court is whether or not the widow in the lifetime of the deceased, having accepted said Will in question or Codicil thereto in lieu of all her rights of the estate of her deceased husband, can now come and claim in addition to the provisions of the Will the award of $2,000.

It appears that Thomas F. Painter made and executed his original Will in 1907 in and by which he devised to his wife, Lodena Alice Painter, all his property of every kind of which he might die seized to use and enjoy as long as she shall live. That he also provided in the third clause of the Will that the Executors pay one year after the death of his wife to the Cook Cemetery Association, the sum of $500.00, etc., and after the death of his wife all of his property was to go to one Mable B. Swigert.

Subsequently his wife signed a paper by which she in consideration of the provisions made for her in the Will, she would relinquish and release all rights, under and by virtue of

Ter. Dr. 1870 [illegible]

In the
[illegible]
[illegible]

[illegible] Term, A.D. 1870.

In the Estate of Thomas [illegible].
[illegible], deceased, [illegible]
[illegible], Executor
(Opposer)
Appellee.

[illegible] Appeal from the Probate
[illegible] Court of Cass County.

MEMORIAL [illegible]:

This case comes up on appeal to be heard from the Circuit Court of Cass County, Illinois, on [illegible] the question of whether or not Jackson [illegible] Executor, [illegible] a widow's award at said place of [illegible] Probate, deceased, in the sum of $[illegible].

The question raised by this record is [illegible] is presented to this court [illegible] of the Statutes, Revised Statutes [illegible] or Dodrill thereto in lieu of all her rights [illegible] her deceased husband, [illegible] provisions of the Will [illegible].

It appears that [illegible] his original Will in 1907 in [illegible] wife, Jackson Alice [illegible], all the property [illegible] money he might die seized [illegible] at the time of his death, [illegible] that the Executors [illegible] the Cook Chemical Company, [illegible] after the death of the said [illegible] Table 3. Interest.

[illegible] equal/section of the provisions [illegible] would restrictions and [illegible] [illegible] of widow [illegible]

the Statutory dower, and accept the provisions of said Will as her entire share in said estate. That is to say, she accepted the Will and took a life estate in all the said property in lieu of ~~my~~ her rights under the statute if said Will had not been made.

Subsequently a Codicil was made to said Will by which he revoked the provisions made in the third clause of his Will giving $500.00 to the Cook Cemetery Association and bequeathed this sum to his wife to use and enjoy as long as she should live; that after her death the said $500 should go to the said Mabel B. Swigert and her heirs.

It appears also that after the execution of the Codicil another paper was entered into which, namely, among other things, stated the making of the original Will and also the Codicil thereto and that in consideration of the provisions of said Codicil grant to her the use of the $500 during her lifetime, that she relinquish all rights of dower under and by virtue of the Statute of Illinois, and accept the provisions of said Will and the Codicil thereto as her entire share in the Estate of said Thomas F. Painter.

It will be observed that the second writing signed by the widow of the said Painter is not as binding as the first contract. In the first contract she agreed to accept the terms of the Will and take a life estate in all said property in lieu of all her rights under the Statute as if said Will had not been made. In the second contract all she agreed to do is to release all rights of dower to and by virtue of said statute, etc. Nothing is said about widow's award.

Thomas F. Painter died September 14, 1930, leaving his widow, there being no children. The Will and Codicil, together with the agreements attached thereto, were duly filed in the County Court of Knox County, Illinois, and admitted to probate on December 4, 1930.

It appears that thereafter, on the 24th of December, 1930, appraisers were appointed in said estate and the appraisers fixed the widow's award at $2,000.00 to which the Executor of said estate objected, claiming that it should not be allowed for the reason that the widow, during the lifetime of her husband, executed a certain instrument in writing in which she accepted the terms and conditions of said Will and Codicil in lieu of her dower and all other rights under the Statute.

The cause came on for a hearing, the County Court sustained the award in said sum of $2000.00. Upon an appeal by said Executor to the Circuit Court of Knox County, the Circuit Judge sustained the award in the said sum of $2000 and an appeal was taken to this Court.

Evidence heard upon the hearing in the Circuit Court indicated that the deceased and his wife lived on a farm near Maquon, Illinois, and later moved to Knoxville; that they had no children; that for many years the widow has been troubled with high blood pressure and loss of hearing and cannot do usual housework. She now lives in the late home of her husband in Knoxville.

The original Will of Thomas F. Painter, deceased, dated October 4, 1907, bequeathed and devised a life estate in his prope rty to his wife and provided that after the death of his wife $500.00 should go to a cemetery association and then all the rest and residue of the estate should go to one Mabel G. Swigert, who was no relation to either the deceased or of his wife.

By the terms of the Will, Emanuel L. Swigert, husband of the residuary legatee and devisee under the Will, was appointed Executor with Armor Moreland as first successor, John R. Moreland as second successor and M. J. Daugherty as third successor.

At the time of the execution of the Will Emanuel Swigert came with Thomas F. Painter to the law office of John R. Moreland, and Swigert introduced Painter to Moreland. The original Will was prepared in the law office of Mr. Moreland.

On the same date, the wife of the deceased executed a document as follows:

"Maquon, Ill., Oct. 4, 1907

This Contract witnesseth: That in consideration of Thomas F. Painter (my husband) having made his Last Will and Testament in which he has willed to me a life estate in all his property. I hereby accept said Will and relinquish and release all my rights, under and by virtue of the statutory dower, and accept the provisions of said will as my entire share in said estate. That is to say, I accept the will and take a life estate in all the said property in lieu of my rights under the statute if said will had not been made.

Lodema Alice Painter

Witness
F.C. Bearmore, Maquon, Ill.
H.F. Townsend, Maquon, Ill.
Executor's Exhibit "A" "

Later, on August 28, 1915, at the request of deceased, Moreland prepared a Codicil to the Will, by which Codicil the only change was to the effect that the $500 given to a cemetery association was revoked and was given to Mabel Swigert after allowing the widow a life estate therein. It should be noted that this Codicil was only for the benefit of Mabel Swigert as the original Will provided that the widow should have the use of the entire estate for her life and after her death $500 was to go to a cemetery association and the remainder to Mabel Swigert, whereas, the effect of this Codicil was to annul the bequest to the cemetery association and Mabel Swigert would then get it, together with the remainder of the estate upon the death of the widow.

On the same date that the Codicil was drawn another paper was executed by the then wife of deceased, which is as follows:

"Galesburg, Ill., Aug. 28, 1915.

This Contract and agreement witnesseth: That Whereas my husband Thomas F. Painter has made his Last Will and Testament on the fourth day of October Nineteen Hundred and Seven, and has also on this date made a codicil thereto, on this date in which provision is made that Five Hundred Dollars, formerly devised to the Cook County Cemetery Association of Knox County, Illinois, shall instead of going to said Cemetery Association, be devised to Mabel B. Swigert and her heirs, after my death, but that during my life time I shall have the use and benefit of the same.

Now, Therefore, in consideration of the provisions of said codicil granting unto me the use of said Five Hundred Dollars during my lifetime, I hereby accept and join in said codicil to said Will and relinquish and release all rights of dower under and by virtue of the statute of Illinois and accept the provisions of said Will and the codicil thereto as my entire share in the estate of my husband Thomas F. Painter.

Lodema Painter

Witnesses
A.S. Potter; E.B. Wade"

The testimony shows that the Will, codicil and the two papers signed by Mrs. Painter were all fastened together and that after the death of the deceased, Moreland, who had drawn the Will, secured the Will, Codicil and the two papers from Emanuel Swigert, the husband of Mabel Swigert.

This is practically all the testimony that was offered in the case, except perhaps as to the value of the estate, which is estimated to be worth approximately $15,000.

There seems to be no evidence in the record as to any circumstances attending the execution of the two documents signed by Mrs. Painter, and that was furnished by Moreland, who prepared the Will and Codicil.

It should be noted that the Will does not devise and bequeath to the wife the property in lieu of dower, homestead or statutory rights, no reference being made in the Will to the papers which were signed by Mrs. Painter by means of which it is now sought to preclude her from claiming the widow's award. It is

the contention of appellant that a wife can, during her husband's lifetime, effectively bind herself by written contract to accept the provisions of her husband's Will and estopp herself from renouncing it after his death and appellant cites numerous cases to sustain this proposition in the brief and this is undoubtedly the law in Illinois, but it must appear that such agreement should be considered by strict rules and should only be enforced upon clear and convincing evidence and it is required that the contract be certain and definite in all its part and that it be mutual and founded upon an adequate consideration. Rice vs. Winchell, 285 Ill. at 40. This being one of the cases cited by appellant to sustain its objections to the award. Reference is made also by appellant to the case of Carling vs. Peebles, 215 Ill. 96, as sustaining his position, but in that case the agreement entered into was released for a present consideration and practically all of the cases cited by appellant were cases of an ante-nuptial or a post-nuptial settlement; where the settlement was baded upon a valuable consideration and where the agreements were mutual, reciprocal and fair; where there is no question of undue influence and the wife had full knowledge of all of his property and of all her rights therein, and for these reasons we do not beliefe they are in point in the instant case.

Our courts have been very liberal in sustaining awards of the estate of a decedent for the support of his widow. Moss vs. Moss 208 Ill. App. 589.

No question is raised in this court as to the excessiveness of the award and therefore that is not now before us, although raised in the court below.

Persons who are appointed executors under a Will occupy a fiduciary relation to the widow and occupying such relationship, the burden is upon them to show any release of

the widow's award was obtained fairly upon an adequate consideration and with full understanding on the part of the widow as to her rights under the law and as to the nature and extent of the deceased's property. In the case of Hessick vs. Hessick, 169 Ill. 486, in the case of an ante-nuptial contract, the court said,

> "One making an ante-nuptial contract with an intended wife stands in such a fiduciary relation toward her as imposes upon him the duty of making a full disclosure of the nature, character and amount of his property, and
>
> where one making an ante-nuptial contract with an intended wife fails to disclose the full character and extent of his property, and the provision made for her therein is less than she would be entitled to by virtue of her marriage, equity may annul the contract in a contest, after the husband's death, between his widow and his heirs*** and the burden is cast upon those claiming in his right, in a contest with her, the burden of proving full knowledge on her part of all facts materially affecting the contract."

In Marshall vs. Coleman, 187 Ill. 556, the court held that

> "An advantage gained at the expense of the confiding party by an abuse of a fiduciary or confidential relation will not be permitted to stand, even though the transaction could not be impeached but for the existence of such relation."

When a fiduciary relation is shown to exist it is not necessary that intentional and actual fraud be established in order to set aside a contract or deed as these contracts or deeds are closely scrutinized by courts as a presumption is against the validity of the transaction and the burden is cast upon the dominant party to show that the transaction is not against equity and good conscience. Beach vs. Wilton, 244 Ill. 413.

The case of Mayrand vs. Mayrand, 194 Ill. 45, is authority for the proposition that

> "Sons of the testator who are executors and residuary legatees under the Will, occupy such a fiduciary relation to their stepmother, the widow, as to cast upon them the burden of showing that a release of the widow's award, contained in her written acceptance of the provisions of the will, was executed by the widow fully understanding the effect thereof and intending thereby to release her award."

The same rule obtains with reference to post-nuptial contracts as has been herein outlined as applying to ante-nuptial contracts. And in all the cases bearing upon these questions it was the duty of those seeking to sustain such agreements to prove that they were honestly and fairly entered into with an adequate consideration and with full knowledge of the nature and extent of the property and of the wife's rights therein.

We see no reason upon principal why the same rules should not apply in determining the validity of the writings signed by Mrs. Painter. Why was it not the duty of her husband, or of the attorney who prepared the agreement, to inform Mrs. Painter of her rights in the matter under the law at the time or just before she attached her signature thereto?

We are of the opinion that it was incumbent upon the executor, who is protesting this widow's award, to have introduced evidence into the record upon the trial of this case tending to prove that this woman knew what she was about and was fully informed as to her rights. She should have been advised that, there being no children, if her husband died, she would be entitled to all the personal property and half of the real estate, in fee simple, and a dower in the other half and in addition thereto, a widow's award and the right of homestead, and, in addition to that information, we believe there should have been some adequate present consideration so as to bind her. There were no reciprocal agreements between Painter

and his wife so as to bind both of them. Both the Will and the papers signed by Mrs. Painter were unilateral documents and could be revoked at any time by either person thereunto signing.

We have investigated the record in this cause and we have reached the conclusion that the judgment of the Circuit Court of Knox County should be affirmed and that the widow is entitled to the award.

The judgment of the Circuit Court of Knox County will therefore be affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8473

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: On MAY 15 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8473 Ag. No. 13.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1932.

Edward Oltmanns, Administrator
of the Estate of Beulah Oltmanns,
deceased,
Plaintiff in error,
vs.
Edward Meiners,
Defendant in error.

Error to the Circuit Court
of Whiteside County.

BALDWIN, J:

The defendant in error, Edward Meiners, was driving on a hard road of our state highway about two miles north of the City of Sterling, Illinois. With him was his family and along about eight o'clock in the evening on July 21, 1928, he struck a child named Beulah Oltmanns. The child at that time was about 5½ years old. The child was killed. Her father, Edward Oltmanns, was appointed administrator of her estate and brought suit in the Circuit Court of Whiteside County against Meiners for damages for the death of the child alleging negligent operation of the automobile. Trial was had, resulting in a verdict for the defendant in error. Case brought to this court on a writ of error.

The first count of the declaration charges the defendant with driving at an unreasonable rate of speed of 40 miles per hour and on account of this carelessness the child was run over and killed. The second count is practically the same as the first. The third count is a general negligence count.

The evidence shows that this child, in company with her brother and another small child, had gone down the hard road for a distance of about a quarter of a mile to get a bucket of milk and as the children were returning home and approaching their own home the child was struck and killed by the automobile of the defendant in error. There is some evidence that the automobile was being driven at he rate of 40 miles per hour, but the pre-

HOLDEN, J:

ponderance of the evidence is that the car was not being driven at a reckless rate of speed, but approximately at 25 miles per hour. That the defendant in error's automobile lights were burning, there was nothing to hinder the children from seeing the car approaching. That as the car neared the place where the children were walking, this child stepped off of the side of the road onto the pavement right in the path of the approaching automobile. There is evidence to show that her little brother had her by the hand and tried to pull her out of danger, but was unable to do so.

Plaintiff in error complains, first, that the court erred in giving certain instructions for defendant in error and in refusing to give certain instructions for plaintiff in error. Second, the court erred in overruling plaintiff's motion for a new trial, and, third, that the verdict is contrary to the law and evidence and these are the only questions raised in this record.

It should be borne in mind that this action is brought under the Injuries Act by the administrator of the estate of the deceased for and on behalf of the next of kin who consisted of her father, who is the administrator bringing the suit, her mother and a brother passed seven years of age.

Plaintiff in error cites a number of cases in his brief to the effect that negligence will not be imputed to a child under the age of seven years, but it will appear from these cases so cited that they were all brought by an injured person under the age of seven and have no application in that respect to a case brought under the Injuries Act by an administrator for the benefit of next of kin, for under such latter line of cases the contributory negligence of a parent or next of kin may be shown in bar of such actions. Chicago City Railway Company vs. Wilcox 138 Ill. 370.

The declaration in this case did not allege that the next of kin were free from negligence, but no advantage was taken of that before the trial.

Practically the only evidence offered on behalf of plaintiff in error upon the contested facts in the case was that of a witness who was the mother of one of the three children, not the mother of the child who was killed. She testified that she saw the car go by the home of the deceased and could see the children up the road coming towards the home; that the car was going, in her estimation, about 40 miles per hour. She did not testify as to whether or not the car in question had its lights burning. She saw the children up the road, one of them being on the slab, and the next thing she saw was the one on the slab knocked into the air and off to the side of the road.

There were three witnesses for the defendant in error to the effect that the lights on defendant in error's car were burning and that the speed of the car was not in excess of 25 miles per hour; that defendant in error was on the right side of the road and that the car stopped after hitting the child within six to ten feet, or perhaps two car lengths. Two of these witnesses were the driver of the car and his son, who sat beside him in the front seat, and two other witnesses were in a car on the other side of the road approaching the defendant in error's car at or about the time of the accident. One of these witnesses testified that just before the car hit the child, the child seemed to jump onto the road and in front of the car too late to prevent striking her.

There is some question in the testimony also about the lights being on the car and also the visibility at that hour of the day. These were all questions of fact for the jury to determine and if otherwise free from error, the verdict of the jury, in our opinion, is amply supported by the testimony in the record and the motion for a new trial on that point, in our opinion, was properly denied.

We think, as did the trial court no doubt in overruling said motion, that the driver of the motor vehicle in question was

proceeding at a lawful rate of speed and was obeying all the requirements of the law of the road and all the requirements for the careful operation of his machine, and in that view the evidence in our judgment clearly preponderates and the jury were justified in finding as they did and the court also were justified in overruling the motion for a new trial on that point.

Complaint is made that the court modified the first instruction given for plaintiff by inserting the words "if any" after that portion of the instruction calling attention to the want of due care on the part of the defendant. We think without the insertion of the phrase "if any," the jury might properly have believed that the court was holding that there was evidence of want of due care on the part of the defendant, whereas, that was a question to be determined by the jury and the insertion of the words by the court was proper.

Plaintiff in error objects to the court's refusing to give their offered instruction number eight. This instruction was clearly bad for the reason that the record discloses that this child left surviving her, her father, mother and brothers as next of kin and the complained of instruction concludes "you should find the issues for the plaintiff in such sums of money as you believe from the evidence, her father Edward Oltmanns has sustained by reason of her death."

Plaintiff's refused instruction number nine is covered by plaintiff's instruction number one.

Plaintiff's refused instruction number ten is bad for the reason that it calls attention to the parents of the deceased child as "working people."

Plaintiff's refused instruction number eleven is covered by other given instructions. It was merely a directory instruction stating that if the plaintiff is entitled to recover, that they

should assess plaintiff's damages.

Defendant's instruction number 7 is as follows:

> "If you believe from the evidence in this case that the parents or brothers or sisters of the deceased, above the age of seven years were guilty of contributing to the deceased being injured, they cannot recover and your verdict should be in favor of the defendant."

This instruction was given no doubt in view of the evidence in the record of the parents sending these children of tender years on an errand which involved their going of 60 or 70 rods from their home at or about eight o'clock in the evening for a pail of milk which involved their crossing the hard road, or one of the main highways leading directly into a city of approximately 10,000 inhabitants, to go to a place on the opposite side of the road to get the milk and then to return home. All of which facts appear in the record and in our judgment such an instruction, if it properly states the law, was pertinent to the issue.

We think under the authority of Chicago City Railway Company vs. Wilcox, Supra, and Hazel vs. Hoopeston-Danville Bus Co., 310 Ill. 38, this instruction stated a correct proposition of law in this case and was proper to be given, but even if it should not, we think that the plaintiff in error failed to prove any negligence on the part of the defendant and it was not reversible error to give this instruction.

For the reasons indicated herein we are of the opinion that the judgment of the lower court should be affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8215

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 621

BE IT REMEMBERED, that afterwards, to-wit: On MAY 13 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8245 Ag. No. 23

Henry Olson,

Appellant

vs. Appeal from the Circuit

Harry B. North, Court of Winnebago County

Appellee.

PER CURIAM:

The appellant, Henry Olson, filed a suit against the appellee, Harry B. North, an attorney of Winnebago County, charging the defendant with negligently conducting his defense in a certain criminal case in which the appellant was charged with the crime of murder. The appellee filed a demurrer to said declaration. The Court sustained the demurrer and the plaintiff below, stood by his demurrer and the Court dismissed the suit at plaintiff's costs. Plaintiff below brought the case to this court on appeal, to the October term, A.D. 1930.

On April 20, 1931, this Court filed its opinion in said case. In said opinion the Court stated that there was reversible error in the case and reversed and remanded the same to the Circuit Court of Winnebago County.

On May 29, 1931, the appellee filed a petition for a re-hearing in said case, which this court granted.

On June 20, 1931, the appellant filed his brief in reply to the petition for re-hearing.

After considering appellee's petition for re-hearing and the appellant's brief in reply, we are of the opinion that there is no error in the opinion as originally filed, and said opinion is readopted as the opinion of this Court. The judgment of the trial court is hereby reversed and cause remanded to the Circuit Court of Winnebago County with directions to overrule the demurrer.

Dec. 20, 1940

Henry Ulmer,

Appellant,

vs.

Harry D. Barr,

Appellee.

Per Curiam:

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

(Case No.)

Henry Olson, appellant, v. Harry B.North, appellee. Gen. No.8,245.

Action for ne
for murder. Jury.

~~Error to the Municipal Court of Chicago;~~
~~Superior Court of Cook county;~~
Appeal from the Circuit Court of [illegible] county;
~~County Court of county;~~
the Hon. William J. [illegible], Judge, presiding. Heard in ~~the~~ ~~division of~~ this court ~~for the first district~~ at the [illegible] term.

~~Affirmed~~
~~Reversed~~
Reversed and remanded ~~with directions~~.

Opinion filed April 26, 1931 ~~Rehearing denied~~

Frank E. Mayne, [illegible] for appellants.
~~for plaintiffs in error.~~
[illegible] for appellees;
~~for defendants in error.~~

MR. ~~PRESIDING~~ JUSTICE [illegible] delivered the opinion of the court.

BE IT REMEMBERED, that afterwards, to-wit: On

APR 20 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 621 SA

BE IT REMEMBERED, that afterwards, to-wit: On

APR 20 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General number 8245 Agenda number 45

HENRY OLSON,
Appellant,
vs.
HARRY B. NORTH,
Appellee.

Appeal from
Circuit Court of
Winnebago County.

BOGGS, J.

An action on the case was instituted by appellant against appellee in the circuit court of Winnebago County to recover damages for the alleged failure of appellee to use reasonable care and skill in the defense of appellant under an indictment for murder.

A demurrer was sustained to the original declaration. Thereafter appellant filed an amended declaration, consisting of two counts, to which appellee filed a demurrer, general and special. The demurrer was sustained, and, appellant electing to abide his declaration, judgment was rendered against him in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

The first count of said declaration sets forth that on September 6, 1927, one Floyd Stotler was murdered, and on September 13 appellant was arrested, charged with said murder; that on said day he employed appellee as his attorney to conduct his defense; that appellee had been engaged in the practice of law in the city of Rockford for twenty-five years, and for twelve years of said time he was State's Attorney and had tried a large number of criminal cases; that he represented himself to be "especially qualified * * * in the defense of criminal cases, including murder cases"; that during the progress of said trial appellant paid to appellee $4,250 as attorney's fees; that it became the duty of appellee to properly prepare and "in a reason-

General number 8248

HENRY OLSON,

Appellant,

vs.

HARRY B. NORTH,

Appellee.

DOGGS, J.

An action on the case was instituted by appellant against appellee in the circuit court of Kingsmoo County to recover damages for the alleged failure of appellee to use reasonable care and skill in the defense of appellant under an indictment for murder.

A demurrer was sustained to the original declaration. Thereafter appellant filed an amended declaration, consisting of two counts, to which appellee filed a demurrer, general and special. The demurrer was sustained, and, appellant electing to abide his declaration, judgment was rendered against him in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

The first count of said declaration sets forth that on September 8, 1927, one Floyd Bostler was murdered, and on September 13 appellant was arrested, charged with said murder; that on said day he employed appellee as his attorney to conduct his defense; that appellee had been engaged in the practice of law in the city of Rockford for twenty-five years, and ten years years of said time he was District Attorney and had tried a large number of criminal cases; that he represented himself to be "especially qualified * * * in the defense of criminal cases, including murder cases"; that during the progress of said trial appellant paid to appellee $4,250 as attorney's fees; that it became the duty of appellee to properly prepare and "in a trained-

ably skillful, careful and proper manner" to try said cause; that appellant informed appellee that he was not guilty of said crime; that at the time Stotler was murdered appellant was residing with his parents at 1318 Kishwaukee Street in said city. Said count in detail sets forth the whereabouts of appellant and what he was doing from three o'clock in the afternoon of said day until 1:30 the next morning, when he learned of said homicide; that appellant advised appellee as to all of said facts and circumstances, which were in part corroborated by one James L. Donnet, a bus driver, who saw appellee about nine o'clock on the evening in question; that appellant was tried on two different occasions; that on the first trial the jury disagreed; that on the second trial the jury found appellant guilty; that appellee failed and refused to use the father and mother of appellant and said bus driver as witnesses in proof of the alibi claimed by appellant; that the only evidence offered by appellee on behalf of appellant on the second trial was appellant's own testimony, appellee having placed him on the stand "and asked plaintiff only his name, address, and whether or not he had killed Floyd Stotler, to which latter question plaintiff replied 'no'"; that on the first trial appellant's father and mother and said bus driver testified in support of said alibi; that after appellant had been arrested and had employed appellee, one George Bliss and one Morris Mahan were arrested for carrying concealed weapons, and employed appellee to represent them; "that the gun found concealed on the person of the said George Bliss was a gun of the same calibre, bore and description and was loaded with the same kind of bullets and shot the same kind of bullets as the gun which killed the said Stotler, and as were found in the body of Stotler"; that appellee was present in the county court as the attorney of Bliss and Mahan when they were sentenced; that the county judge stated in open court that the gun taken from Bliss "was of the same kind, character and calibre as the gun used in the killing of Floyd Stotler"; that appellant requested appellee to investigate as to

whether the gun found concealed on the preson of Bliss was the gun from which the bullet was fired that killed Stotler, but that appellee failed and refused to make such investigation.

Said count further avers that "at the hour and time of the murder of Floyd Stotler, plaintiff's father and mother were at their home at street number 1318 Kishwaukee street aforesaid, where plaintiff and his wife were also residing at that time, and where the plaintiff was at the hour and time of the murder of Floyd Stotler, and that the testimony of plaintiff's father, Emanuel Olson, was material and necessary to establish the alibi of the plaintiff in the second trial of plaintiff, Henry Olson, for the murder of Floyd Stotler, and that the said defendant, Harry B. North, knew and fully understood that Emanuel Olson, plaintiff's father, could testify that plaintiff was at his home aforesaid, at the hour and time of the murder of Floyd Stotler, and yet, the said defendant, Harry B. North, failed and refused to put the said Emanuel Olson on the witness stand in the second trial of plaintiff for the murder of Floyd Stotler." The same averment is made with reference to Sarah Olson, the mother of appellant.

Said count further charges that Orville Stotler, the father of Floyd Stotler, who was an eye-witness to said homicide, testified "that the bandit who shot and killed his son, Floyd Stotler, in his presence, was the same size and height as his own son; * * that the said Floyd Stotler was approximately five feet and ten inches tall and weighed approximately one hundred and eighty pounds, while the plaintiff was a man of slight build and frame and only five feet seven and three-quarters inches tall," that appellant requested appellee to investigate such matter but he refused so to do; that appellee also heard the father of said Floyd Stotler testifie that the bandit who shot and killed his son had had a recent haircut and was clean shaven and that he had a high haircut; that he, appellant, had not had his hair cut for more than five weeks; that his hair was shaggy and unkempt and did not look like a high haircut; that he asked appellee to in-

vestigate into these facts and that he failed and refused so to do; that prior to the second trial of said cause appellant informed appellee that he had been informed that several suspects had been taken in by the police department of the city of Rockford and examined as to their connection with the murder of Stotler, and each of them had had finger prints made of their hands and that there were finger prints found on the door of the automobile like the automobile in which the bandits came to the murder; that appellant's finger prints had not been taken and that he desired to have them taken and compared with such prints, but that appellee refused to make any investigation or to have appellant's finger prints taken; that appellee cross examined Orville Stotler, the father of said deceased, for two and a half days; that such examination was unskillfully done, and was of a character to humiliate said witness and to prejudice the jury against appellant on account thereof; that on account of the foregoing matters appellant was found guilty on the second trial of said cause; that the circuit court released appellant on his own recognizance; that he, appellant, was panic-stricken and fled from the jurisdiction of the court and that no one in or about the county of Winnebago knew his whereabouts; that thereafter appellee procured the services of another attorney, who obtained an admission of guilt from the said Bliss and Mahan " and then and there the said Harry B. North disclosed for the first time that George Bliss and Morris Mahan were in fact the guilty parties who had murdered Floyd Stotler;" that said parties were arrested, charged with said crime and pleaded guilty to said charge.

Said count further avers that during all the time of said employment appellant had kept good faith with appellee, but that appellee had negligently, carelessly, improperly, indifferently and unskillfully failed and refused to perform his duty and to use ordinary care, caution and prudence in preparing said defense, alleging damages, etc.

The second count, in addition to certain of the averments of the first count, avers that "the said Harry B. North, defendant,

at the time well knew that the gun carried by George Bliss was the gun that had been used in the murder of Floyd Stotler, and that the bullets in the body of Floyd Stotler were bullets that had come from the gun carried by George Bliss as aforesaid, and that in order to protect his then clients, George Bliss and Morris Mahan, the said Harry B. North wrongfully, wickedly and intentionally failed and refused to examine into the question by hiring an expert to examine said guns and bullets," etc. Said count further charges that after appellant had been convicted on said second trial and had absconded, "the said Harry B. North, defendant, in order to relieve and help clarify the situation, disclosed the fact that George Bliss and Morris Mahan were the guilty parties who had killed and murdered Floyd Stotler"; that appellant "during all of said time, wrongfully, maliciously and intentionally continued to represent George Bliss and Morris Mahan until after the second trial of the plaintiff, Henry Olson, and until after plaintiff had been found guilty of the murder of Floyd Stotler, as aforesaid, and continued to accept and take the large fees from the plaintiff for services in defending him, the said Henry Olson, plaintiff, as aforesaid, in the said criminal case to the amount of $4,250, and that in addition to the said $4,250, the said plaintiff expended and paid out to Harry B. North and others for investigating the matter and hiring detectives other large sums of money, amounting altogether to nearly the sum of $7,000." etc.

The principal ground urged on the special demurrer is that the first count of the declaration is bad for duplicity. In this connection counsel for appellee insist that the different acts of misconduct charged against appellee constituted separate causes of action.

This point is not well taken. Appellee is charged with negligence in his conduct of appellant's defense to said charge of murder. The different acts of commission and omission charged, so far as well pleaded, merely support the charge of negligence. See Kinney v. Turner, 14 Ill. 182-183; Stephen on Pleading, sec. 263.

It is next insisted, as to each count of the declaration, that there is no causal connection between the acts of negligence charged and the damages claimed, in other words, counsel insist that it is necessary to aver and prove that, by reason of the negligence charged, appellant was convicted.

When a person adopts the profession of the law, if he assumes to exercise the duties in behalf of another for hire and reward, he must be held to employ in his undertaking a reasonable degree of care and skill. If injury result to the client from the want of such a degree of reasonable care and skill, he must respond in damages to the extent of the injuries sustained. Stephens v. Walker, 55 Ill. 151-152; Morrison v. Burnett, 56 App. 129-135; 6 Corpus Juris, p. 682, sec. 206.

"It is the duty of an attorney to bring to the conduct of his client's buriness the ordinary legal knowledge and skill common to members of the legal profession, to act toward his client with the most scrupolous good faith and fidelity, and to exercise in the course of his employment that reasonable care and diligence which is usually exercised by lawyers." 6 Corpus Juris, p. 682, sec. 206; Morrison v. Burnett, supra, 135.

Each count of the declaration sets forth the employment of appellee by appellant to represent him in the defense of said charge. Under the foregoing authorities, it was the duty of appellee to use that degree of prudence, skill and diligence ordinarily exercised by attorneys, and, for failure so to do, he would be liable to appellant for the proximate damages, if any, resulting therefrom.

Counsel for appellee insist; first, that the declaration and each count thereof fails to state a cause of action; second, that even though the averments of the declaration be held to be well pleaded, there is no showing of any proximate damage resulting to appellant by reason thereof.

Whether or not all of the averments of the declaration are well pleaded, there are sufficient facts averred in each of said counts, which, if proved, disclose that appellee negligently failed to perform his duty as an attorney.

The first count, among other things, sets forth in effect

It is next insisted, on behalf of the defendant,
that there is no causal connection between the acts of carelessness
charged and the damages claimed; in other words, counsel argues
that it is necessary to have had many fires, or people on the
premises charged, appellant was entitled.

When a person admits the material of the law, if he
assumes to exercise the duties in behalf of another for hire and
reward, he must be held to comply in his undertaking a reasonable
degree of care and skill. If injury results in the client from the
want of such a degree of reasonable care and skill, he must respond
in damages to the extent of the injuries sustained. Thompson v.
Walker, 55 Ill. 133-139; Hotchkiss v. Burnett, 90 Ill. 494-497;
8 Corpus Juris, p. 681, sec. 108.

"It is the duty of an attorney to bring to the conduct
of his client's business the ordinary legal knowledge and skill
common to members of the legal profession, to act towards his client
with the most scrupulous good faith and fidelity, and to exercise
in the course of his employment that reasonable care and diligence
which is usually exercised by lawyers." 5 Corpus Juris, p. 388,
sec. 308; Kirkpatrick v. Burnett, supra, 178.

Each count of the declaration sets forth the employment
of appellee by appellant to recover, in a suit, the damages of said
charge. Under the foregoing authorities, it was the duty of appel-
lee to use that degree of prudence, skill and diligence ordinarily
exercised by attorneys, and, for failure so to do, he would be
liable to appellant for the damages he has, resulting
therefrom.

Counsel for appellee insist; first, that the declaration
and each count thereof fails to state a cause of action; second,
that even though the averments of the declaration be held to be well
pleaded, there is no showing of any pecuniary damage resulting to
appellant by reason thereof.

Whether or not all of the averments of the declaration are
well pleaded, there are sufficient facts averred in each of said
counts, which, if proven, disclose that appellee negligently failed
to perform his duty as an attorney.

The first count, among other things, sets forth in effect

that the father and mother of appellant knew and would testify that, prior to and at the time of said homicide, appellant was at home; that said bus driver would also testify in partial corroboration thereof; that, while in the employ of appellant, appellee undertook the defense of Bliss and Mahan on a charge of carrying concealed weapons; that while so employed, it came to his knowledge that Bliss and Mahan were the probable murderers of Stotler; that, notwithstanding this information, appellee continued to represent said parties as well as appellant; that appellee was cognizant of the fact the father of the deceased had testified that the man who did the shooting was about the size of his son; that if said lead had been followed it would have disclosed that the man who shot Stotler was much taller and heavier than appellant; that said witness also testified that the man who shot his son had a recent, high haircut, and was clean shaven, and that proof could have been offered that appellant, on the date in question, had not had a haircut for five weeks, and that his hair was shaggy and unkempt.

Said second count contains the averment that appellee "well knew that the gun carried by George Bliss was the gun that had been used in the murder of Floyd Stotler, and that the bullets in the body of Floyd Stotler were bullets that had come from the gun carried by George Bliss as aforesaid, and that in order to protect his then clients, George Bliss and Morris Mahan, the said Harry B. North, wrongfully, wickedly and intentionally failed and refused to examine into the question."

It is not necessary to further refer to the averments of said count. The facts well pleaded therein clearly charge appellee with negligence, if not with wilful and wanton conduct in connection with the defense of appellant.

If it be contended that the information that Bliss and Mahan were the guilty persons, came to appellee in the confidential relation of attorney and client, and that appellee would not have been warranted in using such information in his defense of appellant, then appellee should have advised appellant that he could no longer properly defend him, and returned to appellant said attorney's fees.

"When an attorney has been retained and has received the

properly defend him, and returned to Scullin's self attorney's fees.

"When an attorney has been retained and he receives the

confidence of his client, he cannot enter the services of those whose interests are adverse to those of his client, no matter how honest his motives and intentions." Strong v. International Investment Union, 183 Ill. 97-101; People v. Gerold, 265 Ill. 448-477; People v. Hanson, 290 Ill. 370-372; People v. Sullivan, 279 Ill. 634-646.

On their second proposition, counsel insist that it was not the fault of appellee that appellant was confined in the jail pending his trial, as he would have been so confined during said time whether he was found guilty or innocent; that there is nothing to show that after said trial and verdict of guilty appellant had ever been deprived of his liberty, and that therefore no damage is shown.

Counsel wholly overlook the fact that said declaration sets forth the payment to appellee of $4250.00 in attorney's fees. If the averments of the declaration are true, appellant would clearly have the right to recover damages, at least equal in amount to the attorney's fees so paid. It therefore follows that the second proposition is not well taken.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(88416—1M—5-28)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 622

BE IT REMEMBERED, that afterwards, to-wit: On MAY 28 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8488 Agenda 18

In the Appellate Court

Second District

February Term, A.D. 1932

Henry Boomgarden, as Administrator
of the Estate of Augusta Boomgarden,
deceased,

Appellee

vs.

Chicago and Eastern Illinois Railway
Company, a corporation,

Appellant

Appeal from Circuit Court
of Iroquois County

Baldwin, J.

This is an appeal prosecuted to reverse a judgment in the sum of $3,000.00 in a suit brought by the plaintiff (appellee herein) as Administrator of the estate of Augusta Boomgarden, deceased, against the defendant (appellant herein) in the Circuit Court of Iroquois County, Illinois.

The suit was brought to recover damages for the alleged wrongful death of Augusta Boomgarden growing out of a railroad crossing accident occurring at the intersection of Hickory Street and the right of way of the Chicago and Eastern Illinois Railway Company in the City of Watseka, Illinois.

The Chicago and Eastern Illinois Railway Company is possessed of a double track railroad and operates railroad trains thereon through the city of Watseka, Illinois. These tracks pass through the city of Watseka in a direct north and south direction. The east main track is commonly designated as the north bound main track and the west main track is commonly designated as the south bound main track.

The railroad depot is located on the east side of the railroad right of way. A short distance north of the depot the tracks of the Chicago and Eastern Illinois Railway Company are intersected at a right angle by a street known as Walnut

No. 8482 Agenda 12

In the Appellate Court

Second District

February Term, A.D. 1919

Henry Doemerden, as Administrator
of the Estate of Augusta Doemerden,
deceased,

Appellee

vs.

Chicago and Eastern Illinois Railway
Company, a corporation,

Appellant

Baldwin, J.

This is an appeal prosecuted to reverse a judgment in the sum of $3,000.00 in a suit brought by the plaintiff (appellee herein) as Administrator of the estate of Augusta Doemerden, deceased, against the defendant (appellant herein) in the Circuit Court of Iroquois County, Illinois.

The suit was brought to recover damages for the alleged wrongful death of Augusta Doemerden resulting from a collision occasioning accident occurring at the intersection of Vickery Street and the right of way of the Chicago and Eastern Illinois Railway Company in the City of Watseka, Illinois.

The Chicago and Eastern Illinois Railway Company is operated of a double track railroad and operates railroad trains thereon through the city of Watseka, Illinois. These trains pass through the city of Watseka in a direct north and south direction. The most main track is commonly designated as the north bound main track and the west main track is commonly designated as the south bound main track.

The railroad depot is located on the east side of the railroad right of way. A short distance north of the depot the tracks of the Chicago and Eastern Illinois Railway Company are intersected by a right angle by a street known as Vickery

Street, which is also designated as the "Dixie Highway", at which point there are located traffic gates on each side of the railroad. One block north of Walnut Street is Oak Street. One block north of Oak Street is Ash Street and one block north of Ash Street is Hickory Street, the center of which is 1300 feet north of the railroad depot. Each of these streets intersect and cross the railroad right of way at right angles.

The accident occurred either at or immediately north of the intersection of Hickory Street and the railway right of way of the defendant.

Immediately north of the depot a side track branches to the east from the north bound main track and along the side track are situated an elevator, mill, certain coal houses and other business buildings. This side track runs substantially parallel with the north bound main track and rejoins the north main track at a point about one hundred feet north of Hickory Street. To the east of this side track, accessible only from its north end, is another side track which extends from slightly north of the intersection of Hickory Street southward to approximately the north line of Oak Street.

Along, and adjacent to, the west side of the railroad right of way, and parallel therewith, is a street known as Kay Street. On the west side of Kay Street is located a concrete sidewalk from Walnut Street to and beyond Hickory Street. At each of these cross streets there are certain railway crossing signs.

On the occasion of the accident, July 9th, 1930, the regular north bound passenger train No. 8 of the Chicago and Eastern Illinois Railway Company, consisting of locomotive, tender and six coaches, stopped at the depot at Watseka shortly after six o'clock in the evening, while yet daylight. Upon receiving appropriate signals the engineer of the train opened a valve which started the bell on the engine ringing and which automatically

continued ringing such bell. This train moved forward traveling northward from the depot on the north bound main track of the said railroad company.

After the train passed Walnut Street the fireman stepped down from his seat in the cab to refuel the locomotive and he again took his station on the left hand side of the locomotive at or shortly beyond Hickory Street. At this point the train was moving at from ten to twelve miles per hour.

The plaintiff's intestate, a woman aged fifty-six, and in good health, was walking north on the west side of Kay Street toward Hickory Street. Before reaching Hickory Street she crossed Kay Street diagonally, walking in a northeasterly direction and so continued walking in such direction across the intersection of Hickory Street and the railroad right of way. Hickory Street has a cinder roadway across the railroad right of way, but no foot paths. As the plaintiff's intestate walked across Kay Street and across Hickory Street toward the northeast she was walking stooped over, her head down and holding her hands behind her. In this position she continued walking until she walked in front of the train either on the intersection at Hickory Street or slightly to the north thereof. As she reached about the center of the north bound main track she looked to the south and began to run but was struck by the locomotive and thrown to the east of the main track. In the accident she received injuries from which she died a few hours later. None of the trainmen saw plaintiff's intestate and did not know the train had struck her until the train arrived at a station known as St. Anne, several miles north of Watseka.

Plaintiff's intestate lived immediately east of the crossing and had so lived for some time. She had repeatedly crossed the railroad right of way at this point and was familiar with the intersection.

In this vicinity the railroad tracks are three to four feet above the level of the surrounding area. The view from Hickory Street to the depot was entirely unobstructed.

The declaration in this case consists of the four amended counts. The first amended count charged that the defendant possessed and operated through the City of Watseka, a municipal corporation, a certain passenger train and by its servants was driving the same in a northerly direction along its track and across the street crossings of Walnut Street, Oak Street, Ash Street and Hickory Street in the City of Watseka, all of which intersected the railroad tracks at right angle; that the defendant, at about 6:15 P.M. on July 9th, 1930, by its servants, wilfully and wantonly drove and managed the locomotive engine and cars that by and through the wilful and reckless conduct of the defendant by its servants the locomotive ran into and struck the said Augusta Boomgarden with great force and violence and in consequence of said injuries there received she died three hours afterward. It is also alleged that the said deceased left surviving her husband and five children.

The second amended count charged substantially the same as the first count except that in it was pleaded a certain ordinance of the City of Watseka concerning the speed of railroad trains in the city limits and also a certain order of the Illinois Commerce Commission concerning the speed of railroad trains in cities and alleged that the defendant, by its servants, wilfully and wantonly managed and drove the locomotive and cars at forty-five miles per hour and by reason thereof the locomotive ran into and struck with great force and violence said Augusta Boomgarden and injured her and from such injury she thereafter died.

The third amended count alleged substantially the same as the first count except that it was alleged that the defendant by its servants wilfully and wantonly failed to approach the crossing at Hickory Street with caution and failed to ring the bell or blow a whistle or give other warning and in consequence thereof said locomotive ran upon and struck with great force and violence the said Augusta Boomgarden and that in consequence thereof she was injured and thereafter died.

The fourth amended count alleged substantially the same things as the first count except that it was charged that the defendant by its servants wilfully and without regard to the life of plaintiff's intestate drove its locomotive and train upon and along the railroad over and across the said crossing at an unreasonably dangerous and unsafe rate of speed, to-wit: forty-five miles per hour; that in consequence of the unreasonable rate of speed the defendant by its servants drove the locomotive engine and struck plaintiff's intestate with great force and violence, whereby she was injured and thereafter died.

There is very little conflict in the testimony in this case.

The issues are predicated entirely upon wilful and wanton injury and not upon negligence. No negligence is alleged in any count of the declaration and on page 15 of appellee's brief it is admitted that this case is not predicated upon negligence, therefore none of the counts can nor are intended to be treated as negligence counts.

The terms wilfulness and wantonness have a definite meaning in law. They have been variously defined by the Courts but all definitions appear to reach substantially the same ultimate conclusion. Wilfulness and wantonness imply an act committed with the intent or purpose to injure; an injury knowingly or intentionally inflicted; an act intentionally committed under such circumstances and conditions as to imply a conscious indifference as to the consequences thereof, while negligence implies an injury carelessly, heedlessly or recklessly inflicted, without intent to injure.

In Brewster vs Rockford Public Service Company, 257 Illinois Appellate 182 page 189, The Court, quoting from Burns vs Chicago & A. R. Co., 229 Illinois Appellate, 170 page 190, said: "It is to be noted that there is a distinction between negligence and wilfulness. Negligence presumes heedlessness, carelessness, even recklessness, without the purpose or intent to injure, while the very gist of wilfulness and wantonness presumes the intent to injure.

Negligence is not wilfulness or wantonness, and wilfulness or wantonness is not negligence."

In Illinois Central Railroad Co. vs Leiner 202 Illinois 624 page 631 the Court said: "'Wilful' is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent.*** The true conception of a wilful negligence involves a deliberate purpose not to discharge some duty, necessary to the safety of persons or property of another, which duty the person owing it has assumed by contract, or which is imposed upon the person by operation of law: an entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness, such as charges the person whose duty it was to exercise care, with the consequences of wilful injury."

In Jeneary vs. C. & I. Traction Co., 306 Illinois 392 page 397 the Court said: "To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of persons or property of another or an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness, such as charges the person whose duty it was to exercise care with the consequences of a wilful injury."

In Chicago City Railway Co. vs. Jordon, 215 Illinois 390 page 397 the Court said: "In negligence there is no purpose to do a

wrongful act or to omit the performance of a duty. Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. (Chicago, B. & Q. Co. Vs Johnson, 103 Illinois 512). Where there is a particular intention to injure, or a degree of wilful or wanton recklessness which authorized a presumption of an intention to injure generally, the act ceases to be merely negligence and becomes wilful or wanton. In such a case there may be an actual intent to injure, or such a conscious or intentional disregard of the rights of others as to warrant a conclusion that an injury was intended. The true rule was stated in the case above cited, that in negligence, merely, there is no purpose to do a wrongful act or omit the performance of a duty, but that there may be such a dereliction of duty as will furnish evidence of a wilful or wanton act."

In Waldren Express Co. vs Krug, 291 Illinois 472 page 477 the Court said: "An intentional disregard of a known duty necessary to the safety of the person or property of another or an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness such as charges the person whose duty it was to exercise care with the consequences of wilful injury." And again, on page 778, it is said: "What is mean by 'such gross negligence as evidences wilfulness?' It is such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness or wantonness. **** What degree of negligence the law considers equivalent to a wilful and wanton act is as hard to define as negligence itself."

Citation of cases to like effect could be multiplied, but these will suffice to show that the gist of wilfulness and wantonness is intentionally doing an act resulting in injury, with the intent or purpose to injure. In other words, to constitute wilfulness and wantonness, "the intent" is as much a part of the alleged wrongful

act as the injury itself and such intent is wholly inseparable therefrom. To constitute a wilful and wanton injury there must be a union both of an act resulting in injury and an intent to injure.

Thus the intent to injure is as material as the act itself and must be proven by competent evidence like any other fact in a case. It may be proven by direct evidence of the premeditated ill-will, or the actual intent to injure, or it may be proven inferentially by showing the conscious and intentional doing of acts which from the knowledge of the circumstances and existing conditions, one must know that his conduct will naturally result in injury, or by evidence of intentional disregard of a known duty necessary to the safety of persons and property, or such entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences.

In L.S. & M.S. Ry Co. vs. Bodener, 139 Illinois 596 page 606 the Court said: "What degree of negligence the law considers equivalent to a wilful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of a general statement."

In Waldron Express Company vs. Krug, supra at page 479 the Court said: "Where there is a particular intention to injure, or a degree of wilful or wanton recklessness which authorizes the presumption of an intention to injure generally, the act ceases to be merely negligent and becomes wilful or wanton. In such a case there may be an actual intent to injure or a conscious or intentional disregard of the rights of others as to warrant a conclusion that the injury was intended."

In Chicago City Railway Co. vs Jordon, 215 Illinois 390 page 396 the Court said: "It is true that it is not necessary, to sustain the charge of a wilful and wanton injury, that plaintiff should prove an intention on the part of the servants of the defendant to drive the car upon the deceased or that they enter-

tained an ill-will against him, but in such case it would be necessary to prove, not negligence merely, of any degree, but such conduct as would show a general intent to inflict injury.

The question then presented is, does the declaration herein charge wilful and wanton injury?

The declaration, in each count, does not charge that the injury was wilfully and wantonly inflicted upon plaintiff's intestate, but it is alleged that (1) the defendant by its servants wilfully and wantonly drove and managed the locomotive that by the wilful conduct the locomotive ran into and struck Augusta Boomgarden; (2) that defendant wilfully and wantonly managed and drove the locomotive and cars forty-five miles per hour and by reason thereof struck, etc.; (3) That defendant wilfully and wantonly failed to approach the crossing of Hickory Street, etc., and in consequence thereof struck, etc.: (4) That defendant wilfully, without regard to the life of plaintiff's intestate, drove the locomotive across said crossing and in consequence thereof struck plaintiff's intestate.

These allegations and each of them allege wilful and wanton conduct resulting in injury. None of them, however, allege injury wilfully and wantonly inflicted. Courts of this state have frequently held that allegations of wilful and wanton conduct do not amount of charges of wilful or wanton infliction of injury.

In Enochs vs Trevett 229 Illinois Appellate 235 page 241 the Court said: "The declaration in this case does not aver that the defendant wilfully and wantonly injured the plaintiff, but the only wilfulness charged has reference to the violation of the provision of the Motor Vehicle Act, etc., which does not in itself amount to a charge of committing an act of wilful injury or an act of wanton recklessness upon which a general intention to injure may be legally presumed."

In Burns vs Chicago & Alton Railway Co. supra at page 185 the Court said: "A count in a complaint which charges that the death of the plaintiff's intestate resulted by reason of a wil-

ful running of the said train at a high rate of speed, but does not aver that the intention in running the train was to inflict the injury, or aver facts which show that the defendant knew the probable result of such conduct would be to inflict injury, is defective as a complaint for injury wilfully inflicted."

In Harris vs Piggly Wiggly Stores, Inc., 236 Illinois Appellate 392 page 396 the Court said: "That averments in general terms that the defendants servants wilfully drove and propelled the motor truck, etc., over the street intersection, etc., at twenty-five miles an hour contrary to statute, did not state a cause of wilful and wanton infliction of injury, for the very essence of such a charge is lacking, namely, injuring another through volition, with knowledge actual or implied."

By the second count a wilful violation of a speed ordinance and an order of the Illinois Commerce Commission is alleged. It is contended by the appellant that such ordinance and order were incompetent. Without passing upon the competancy of the ordinance an order, it is sufficient to say that the allegation of a wilful violation of an ordinance is not a charge of injury wilfully and wantonly inflicted.

In Burns vs Chicago & A. R. Co., supra at page 196 the Court said: "It has been held in a long line of cases that an averment in a declaration that the defendant wilfully and wantonly operated its train in excess of a speed limit, does not state a cause of action. It is not equivalent to averring that the injury was wilfully and wantonly inflicted.*** The fact that there is a wilful violation of a statute or municipal ordinance from which an injury occurs does not show that the injury was wilfully or wantonly inflicted." Henning Brewing Co. vs Atchison, T. & S. Ry. Co. 150 Illinois Appellate 514; Thrift vs Vandalia R. Co. 145 Illinois Appellate 414; Browne vs Siegel, Cooper & Co. 191 Illinois 234; Illinois Cent. R. Co. vs Eicher, 202 Illinois 556; E. St. Louis Connecting Ry. Co. vs Meeker, 119 Illinois Appellate 27; Blanchard vs. Lake Shore & M. S. Ry Co. 126 Illinois 416; Illinois Cent. Ry. Co.

vs. Hetherington 83 Illinois 516; Pittsburg C., C. & St. L. Ry. Co. vs. Kinnare 203 Illinois 390; Chicago & A. Ry. Co. vs Stone, 109 Illinois Appellate 517; Illinois Cent. R. Co. vs.O'Connor, 189 Illinois 559; Chicago & A. Ry. Co. Vs. Thompson, 99 Illinois Appellate 277.

In Thrift vs. Vandalia Railroad Co., 145 Illinois Appellate 414 page 417 the Court said: "The violation of the ordinance, which is the sole negligence charged, did not constitute wantonness or wilfulness."

Appellee has made the point that these defects or omissions in the declaration were cured by verdict. As we have herein observed the allegations in the declaration are allegations of wilful and wanton conduct and not allegations of injury wilfully and wantonly inflicted. Such allegations do not charge a wilful and wanton injury and unless such defect is cured by verdict the judgment cannot be sustained.

The rule, as often stated, is , "that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." "Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict, in his favor, because, "to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated must be proved at the trial, and it is therefore a fair presumption that they were proved. But where no cause of action is stated the omission is not cured by verdict, for as no right of recovery was necessary to be proved or could have been legally proved under such a declaration, there can be no ground for

presuming that it was proved at the trial." Sargent Co. vs. Baublis 215 Illinois 428 page 430.

In City of Chicago vs Lonergan, 196 Illinois 518 page 521, the Court held: "A verdict, however, will never assist a statement of a defective title or cause of action, and where no cause of action is stated the defect is not cured by verdict, and the objection may be availed of on error after a demurrer has been overruled and a defendant has pleaded over. The rule on that subject is this: "Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor, because 'to entitle him to recover all circumstances necessary, in form or substance, to complete the title so imperfectly stated must be proved at the trial,' and it is therefore ' a fair presumption that they were proved.' But where no cause of action is stated the omission is not cured by verdict, for as no right of recovery was necessary to be proved or could have been legally proved under such a declaration, there can be no ground for presuming that it was proved at the trial." (Gerke vs Fancher 158 Illinois 375 page 380) Andrews Stephen's pleading, Second Edition, page 272.

In our opinion the declaration in this case and each of its counts fails to charge injury wilfully and wantonly inflicted by the defendant. Therefore, the declaration and each count is insufficient upon which to base a verdict in this case.

Appellee has cited several cases in support of his contention that the declaration states a cause of action predicated upon wilful and wanton conduct on the part of the defendant. An examination of these cases, however, disclose that the sufficiency of the declarations were not in question in the cases and therefore such decisions are not authority for the contention that the declaration herein states a cause of action.

Since, as has been noted, none of the counts of the declaration charge negligence, they cannot be treated as general negligence counts. However, if such construction could be given, the evidence is overwhelming that the plaintiff's intestate was guilty of gross negligence which directly contributed to the accident and which would be an absolute bar to any recovery upon any general negligence count.

Other questions have been presented herein but in view of our decision we deem it unnecessary to discuss them.

We hold that the declaration and each count thereof does not state a cause of action of wilful and wanton injury. We further hold that the evidence wholly fails to show that the defendant company was guilty of any wilful or wanton conduct, which in any manner caused the death of the plaintiff's intestate.

For these reasons the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

1277

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 622

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 7 - 1932

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8391 Agenda 13

Hazel R. Batson,

~~appellee~~, defendant in error

vs.

Herbert M. Batson,

~~appellant~~, plaintiff in error

JETT, J:

Error to ~~Appeal from~~ the Circuit Court of Du Page County.

The record discloses that on the 26th day of May, 1930, Hazel R. Batson, ~~appellee~~ defendant in error, filed a verified bill of complaint in the circuit court of Du Page County against Herbert M. Batson, ~~appellant~~ plaintiff in error, praying that he be required to furnish her separate maintenance and support. ~~Appellee~~ Defendant in error alleged in her bill that on or about the first day of January, 1920, she and ~~appellant~~ plaintiff in error were married at Extor, England, and they lived as husband and wife until on or about the 16th day of March, 1930, when the ~~appellant~~ plaintiff in error without any reasonable or just cause deserted her in Du Page County; that she first met the ~~appel-~~ plaintiff in ~~lant~~ error in France when he was a major in the British army; that she owned 490 acres of land in Logan County, Illinois, worth about $200,000. subject to a mortgage; that the ~~appellant~~ plaintiff in error advised ~~appellee~~ defendant in error to sell her property and to bring the proceeds to England, where he could invest it, and they would be able to live on the income; that ~~appellee~~ defendant in error returned to the United States but found that she could not readily dispose of her farm land although she was receiving an income of about $8,000 a year; that after said marriage ~~appellant~~ plaintiff in error withdrew from the British army for the purpose of coming to the United States to enable ~~appellee~~ defendant in error to sell her property and to turn the proceeds over to him for investment; that upon their arrival in the United States they found farm lands were depreciating in value and they were unable to sell the same; that ~~appellee~~ defendant in error turned over to the ~~appellant~~ plaintiff in error all the income from the said farm and they lived upon that until he finally obtained a position in a Chicago trust company at a salary of $75.00 a month; that the said ~~appellant~~ plaintiff in error is a man of ability and of judgment and obtained increases in salary until at the time of the filing of the bill in this cause he was

Hazel B. Tatson,

Appellee;

vs.

Herbert W. Tatson,

Appellant.

Appeal from the Circuit Court of De Page County.

1917, B:

The record discloses that on the 15th day of May, 1915, Hazel B. Tatson, appellee, filed a verified bill of complaint in the circuit court of De Page County against Herbert W. Tatson, praying that he be required to furnish her separate maintenance and support. Appellee alleged in her bill that on or about the 17th day of January, 1903, she and defendant were married at Lenox, Illinois, and they lived as husband and wife until on or about the 15th day of March, 1910, when the defendant without any reasonable or just cause deserted her in De Page County; that she first met the defendant in France when he was a major in the British army; that she owned 420 acres of land in Logan County, Illinois, worth about $200,000, subject to a mortgage; that the defendant offered himself to sell her property and to bring her husband to England, where he would invest it, and they would be able to live on the income; that appellee returned to the United States and was informed that he could not readily dispose of her farm land without the payment of an income of about $8,000 a year; that after said meeting defendant withdrew from the British army for the purpose of moving to the United States to enable appellee to sell her property and to join the proceeds over to him for investment; that upon their arrival in the United States they found that Lewis Hope [illegible] in value and they were unable to sell the same; that defendant turned over to the appellee all the income from the said farm and they lived upon that until he finally obtained a position in a [illegible] trust company at a salary of $75.00 a month; that it was necessary in a man of [illegible] and of [illegible] to expend [illegible] salary until at the time of the filing of the bill in said cause he was

assistant vice president of the National Bank of the Republic at a large salary; the exact amount is unknown to ~~appellee~~ defendant in error, but she is informed and believes his salary to be not less than $7,500 a year and that he has drawn a salary of substantially that amount for the past several years; that the ~~appellee~~ defendant in error's farm land depreciated in value and acting on the advice of the ~~appellant~~ plaintiff in error she deeded it to the bank that held the mortgage; that upon the execution of the deed there became a marked change in the attitude of the ~~appellant~~ plaintiff in error towards ~~appellee~~ defendant in error and he then began a course of unkind, cruel and cold indifference to her; that in the fall of 1929 he went to England on a visit and upon his return he advised ~~appellee~~ defendant in error he would no longer live with her but that she must permit him to obtain a divorce because that was the way it was done in England and it would be too much of a disgrace for him to allow her to obtain a divorce; this she refused to do and ~~appellant~~ plaintiff in error thereupon threatened to leave ~~appellee~~ defendant in error and never contribute to her support unless she would permit him to get a divorce. The ~~appellant~~ plaintiff in error, accordingly, on the said 16th day of March, 1930, abandoned ~~appellee~~ defendant in error and refused to live with her without fault on her part; that ~~appellee~~ defendant in error has no property of any kind or character; that she has been for years sickly and unable to earn a livlihood; that the said ~~appellant~~ plaintiff in error has failed and refused to make contributions towards her support and she was relying upon the charity of friends to provide her with funds; that ~~appellant~~ plaintiff in error purchased certain premises in the village of Glen Ellyn which were occupied by ~~appellee~~ defendant in error and ~~appellant~~ plaintiff in error as a home when they lived together and the said ~~appellant~~ plaintiff in error has been endeavoring to force her to vacate said premises;

The record further discloses that a summons was issued on the 26th day of May, 1930, and was returned on the 9th day of June, 1930, reciting that the ~~appellant~~ plaintiff in error was not found. An alias summons was issued returnable at the October Term. The alias summons was served upon the ~~appellant~~ plaintiff in error on the 13th day of June, 1930. On the 15th day of July, 1930, ~~appellee~~ served notice upon the ~~appellant~~ and his

defendant in error plaintiff in error

solicitor that on the 18th day of July, 1930, she would appear before the circuit court and ask for an order for temporary alimony. On the 18th day of July, 1930, appellant and ~~appellee~~ plaintiff in error defendant in error appeared before the circuit court and ~~appellee~~ defendant in error filed her verified petition for temporary alimony which petition set forth that the ~~appellant~~ plaintiff in error had no property of her own except personal effects and her interest in the premises described in the bill of complaint, and that the ~~appellant~~ plaintiff in error had failed to pay or to give her any money since he deserted her on the 16th day of March, 1930; that at the time ~~appellant~~ plaintiff in error deserted her she had the sum of $315 all of which had been expended except the sum of $150 which she was retaining to apply upon obligations already incurred, and that she was the object of charity of friends and relatives; that she had incurred grocery bills, telephone bills and various and sundry other bills for living expenses since the ~~appellant~~ plaintiff in error deserted her and that on or about the first day of January, 1930, when the ~~appellant~~ plaintiff in error first urged her to grant him a divorce, he offered to furnish her with a home and 20 per cent of his income and to furnish life insurance but because of her great love for said ~~appellant~~ plaintiff in error she refused to consent to a divorce and he threatened that if she would not give him a divorce he would leave her and never make any contribution towards her support until she would consent to a divorce; that she was advised when she filed the bill for separate maintenance that the ~~appellant~~ plaintiff in error was receiving about $7,500 a year and since that time she had been informed he was earning between $8,000 and $10,000 a year and receiving in addition thereto certain bonuses; that the ~~appellant~~ plaintiff in error had told her he had purchased certain stock and bonds of the value of about $20,000 but had sold and assigned his interest in them; that she has no money or funds with which to employ counsel to prosecute said suit.

On the said 18th day of July, 1930, ~~appellee~~ defendant in error filed an affidavit setting up substantially the same facts as were found in her petition.

To the petition the ~~appellant~~ plaintiff in error appeared and filed what purports to be an objection to the jurisdiction of the court. It is urged that since he was summoned to appear on the first day of the October Term 1930, the court did not have jurisdiction to hear the motion for temporary alimony prior to the said October Term of court.

The chancellor on overruling the objections of the ~~appellant~~ plaintiff in error heard the motion of ~~appellee~~ defendant in error and entered an order on the said ~~appellant~~ plaintiff in error decreeing that he pay to ~~appellee~~ defendant in error the sum of $50 per week until the further order of the court. An appeal was prosecuted and the order was affirmed in Batson vs. Batson, 262 Ill. App. 452.

Afterwards and on, towit, the 14th day of November, 1930, the ~~appellee~~ defendant in error presented her petition to the trial court reciting that she has no property, except personal effects and her interest in the premises occupied by her as a residence, and that the said ~~appellant~~ plaintiff in error had failed and refused to pay or to give her any money since he deserted her on the 16th day of March, 1930; that when ~~appellant~~ plaintiff in error deserted her she had Three Hundred Fifteen Dollars, all of which has since that time been expended, and for some considerable time past she had been the object of charity of her friends and relatives; that she had incurred grocery bills, telephone bills and sundry other bills for her living expenses since the 16th day of March, 1930, and that she had been unable to pay the same, and that ~~appellee~~ defendant in error and the ~~appellant~~ plaintiff in error had a charge account at the grocery and meat market of McChesney & Miller at Glen Ellyn, and ~~appellant~~ plaintiff in error had failed to make any payments on said bill for a number of months before he deserted ~~appellee~~ defendant in error, and that ~~appellee~~ defendant in error had continued to purchase her meats and groceries from said firm until the amount had reached the sum of Six Hundred Dollars, and that they had refused to extend further credit; that she was obtaining her electricity for lighting and gas for cooking from the Western United Gas and Electric Company; that she was owing said company forty-five dollars for gas and electricity and that they were threatening

to cut off the same unless the bill was paid; that she was procuring her water for said premises from the Village of Glen Ellyn and that she was now owing twelve and 75/100 dollars for water; that she feared that her water supply would be discontinued; that she had incurred an ice bill of twenty four dollars and a milk bill of thirty six dollars besides many other bills for living expenses, and that ~~appellant~~ plaintiff in error had failed and refused to make any contribution whatsoever toward her support and maintenance, and that she had no income of any kind or nature; that on or about the 8th day of January, 1930, when the ~~appellant~~ plaintiff in error had first urged ~~appellee~~ defendant in error to grant unto him a divorce he had agreed to furnish her a home and pay her twenty per cent of his income and to furnish her a life insurance policy upon the life of the ~~appellant~~ plaintiff in error to secure her in case of his death; that she had refused to either take or permit him to take a divorce and that the said ~~appellant~~ plaintiff in error then threatened that he would leave her and never give her anything unless she permitted him to take a divorce and that he did leave the said ~~appellee~~ defendant in error as aforesaid and has never paid anything to her for support; that the said ~~appellant~~ plaintiff in error is employed by the National Bank of the Republic and she was informed before the said bill for separate maintenance was filed that he was receiving about seventy five hundred dollars per year. Since the filing of said bill she has been informed that he is earning between eight and ten thousand dollars per year and receives in addition thereto certain bonuses from the National Bank of the Republic, and that ~~appellant~~ plaintiff in error had advised ~~appellee~~ defendant in error while they were living together that he had certain stocks and bonds of the value of twenty thousand dollars, but that for several years he had refused to give her any information concerning his ownership of stocks, bonds or other securities and that he had later advised her he had sold and disposed of all of them.

The petition further recited the filing of the petition on the 18th day of July, 1930, the order entered pursuant thereto and the appeal by the said ~~appellant~~ plaintiff in error to this court as above set forth, ~~appellee~~ defendant in error had received no sum whatever from the ~~appellant~~ plaintiff in error pursuant

to said order of said court, and that she had no funds with which to employ counsel to represent her in the Appellate Court and no funds to pay court costs and costs of printing brief and arguments to be presented to this court, and that the said ~~appellant~~ plaintiff in error might be ordered and directed to pay her temporary alimony and solicitor's fees. This petition was sworn to by the ~~appellee~~ defendant in error.

~~Appellee~~ Defendant in error filed an affidavit setting forth in substance the matters set forth in said petition. ~~Appellant~~ Plaintiff in error filed an answer admitting the marriage ceremony and their living together as husband and wife and alleging that he was receiving a salary of not more than seven thousand dollars a year. The hearing on said petition was continued from time to time until the 6th day of December, 1930, when the order in question was entered directing the said ~~appellant~~ plaintiff in error to pay Fifty Dollars upon Saturday, the 6th day of December, 1930, and a further and like sum of Fifty Dollars upon Saturday of each and every week thereafter until the further order of the court, as temporary alimony, and a further sum of Five Hundred Dollars as temporary solicitor's fees herein, payable Fifty Dollars upon the 6th day of December, 1930, and a further and like sum of Fifty Dollars upon Saturday of each and every week thereafter until the said sum of Five Hundred Dollars was fully paid. From this order ~~appellant~~ plaintiff in error prayed an appeal which was allowed upon his furnishing a bond in the sum of Thirty-five Hundred Dollars within thirty days with surety to be approved by the court. On the 2nd day of January, 1930, the ~~appellant~~ plaintiff in error presented his appeal bond to the clerk of the court who duly approved and filed the same.

It is difficult to tell just what the ~~appellant~~ plaintiff in error relies upon for a reversal of the order of the court entered on the petition filed November 14th, 1930. He apparently insists that the court had no right to make any further order in the pending cause because of the fact that the original order for temporary alimony had been appealed from and was then pending in the Appellate Court. We understand the rule to be that notwithstanding the fact an order

to said order of said court, and that she had no funds with which to employ counsel to represent her in the Appellate Court and no funds to pay court costs and costs of printing brief and arguments to be presented to this court, and that the said ~~appellant~~ plaintiff in error might be ordered and directed to pay her temporary alimony and solicitor's fees. This petition was sworn to by the ~~appellee~~. defendant in error.

~~Appellee~~ Defendant in error filed an affidavit setting forth in substance the matters set forth in said petition. ~~Appellant~~ Plaintiff in error filed an answer admitting the marriage ceremony and their living together as husband and wife and alleging that he was receiving a salary of not more than seven thousand dollars a year. The hearing on said petition was continued from time to time until the 6th day of December, 1930, when the order in question was entered directing the said ~~appellant~~ plaintiff in error to pay Fifty Dollars upon Saturday, the 6th day of December, 1930, and a further and like sum of Fifty Dollars upon Saturday of each and every week thereafter until the further order of the court, as temporary alimony, and a further sum of Five Hundred Dollars as temporary solicitor's fees herein, payable Fifty Dollars upon the 6th day of December, 1930, and a further and like sum of Fifty Dollars upon Saturday of each and every week thereafter until the said sum of Five Hundred Dollars was fully paid. From this order ~~appellant~~ plaintiff in error prayed an appeal which was allowed upon his furnishing a bond in the sum of Thirty-five Hundred Dollars within thirty days with surety to be approved by the court. On the 2nd day of January, 1930, the ~~appellant~~ plaintiff in error presented his appeal bond to the clerk of the court who duly approved and filed the same.

It is difficult to tell just what the ~~appellant~~ plaintiff in error relies upon for a reversal of the order of the court entered on the petition filed November 14th, 1930. He apparently insists that the court had no right to make any further order in the pending cause because of the fact that the original order for temporary alimony had been appealed from and was then pending in the Appellate Court. We understand the rule to be that notwithstanding the fact an order

for temporary alimony had been entered and an appeal had been prosecuted therefrom, still it was no bar to a further order for temporary alimony pending of the cause in the Appellate Court.

Section 16 of Chapter 40, Smith-Hurd St. provides: "In case of appeal or writ of error by the husband, the court in which the decree or order is rendered may grant and enforce the payment of such money for her defense and such equitable alimony during the pendency of the appeal or writ of error as to such court shall deem reasonable and proper."

Section 1 of the Act in Relation to Married Women, approved May 17th, 1877, appearing as paragraph 22 of Chapter 68, Smith-Hurd Ill. Rev. St. among other things provides: "And the court at any time after service of summons and proper notice to the husband may make such allowance of temporary alimony, attorney's fees and suit money as may appear just and equitable as in cases of divorce."

In People v. Cook County Circuit Court, 169 Ill. 201, which was a separate maintenance proceeding, an order for temporary alimony, suit money and solicitor's fees was entered by the court on the 27th day of February, 1895. From this order the defendant perfected an appeal to the Appellate Court on the 13th day of March 1895. On the 4th day of April, 1895, two further orders were made, one for the payment of $250 for solicitor's fees in defense of the appeal and the other for $40 alimony for the week ending April 6th, 1895. On April 9th, 1895, the defendant perfected an appeal from the order of April 4th. On April 9th, 1895 the court entered orders, one for $40 for the week of April 14th, 1895, and two orders for the payment of solicitor's fees for defending the appeal perfected on April 9th. Appeals were perfected from these orders. The defendant thereupon filed an original petition in the Supreme Court for a writ of prohibition and the court at page 213 said:"The question then is: in a suit for separate maintenance where an order for temporary alimony and for suit money and solicitor's fees is entered and

appealed from, can the lower court enter further orders, granting money to the wife to defend the appeal taken by her husband, and granting her alimony to be applied pro tanto upon the order for temporary alimony appealed from in case of the final affirmance of the latter order?" On page 214 the court further said: "But where the order entered is one for merely temporary alimony, in a suit for separate maintenance and before the final decree therein is rendered, canm the wife, after the husband has taken an appeal from such order for temporary alimony and while the appeal is pending, have another order entered by the court below for amomony during the pendency of such appeal? The statute says that, in case of appeal or writ of error by the husband the court, in which the 'decree or order' is rendered, may grant and enforce the payment of such money for defense and such equitable alimony during the pendency of the appeal or writ of error as to such court may seem reasonable and proper." In said cause on page 215 it was further said: "We have seen that the husband has a right to appeal from both of such orders and it would seem to be clear that the wife would have the right to call upon the court to compel her husband to furnish her the money to defend an appeal from such orders, and for her temporary support during the pendency. We are, therefore, of the opinion that under Section 15 as above quoted, (referring to the Divorce Act), the wife has a right to compel the husband to pay her money and equitable alimony even during the pendency of an appeal from an order giving her te mporary alimony."

In People v. Pam, 276 Ill. 181, at 184 it was said: "All the cases from Ex parte Thatcher, 2 Gilm, 167, down to the present time, hold that a perfected appeal operates to stay further proceedings by the court rendering the judgment or decree appealed from. The only exception to this rule we know of is, that in divorce cases, after an appeal has been perfected the trial court may make a further order as to alimony. But this is expressly authorized by the statute, (Hurd's St. 1916, Chap. 40, para. 15), and in Elzas

vs. Elzas, 183 Ill. 160, and Jenkins v. Jenkins, 91 id. 167, it was said that this statute created an exception to the rule depriving the court rendering the decree of jurisdiction to enter further orders in the case after an appeal was perfected. In the Jenkins case the court said it would have no hesitation in holding that in the absence of the statute the court rendering the decree would have no jurisdiction after the appeal was perfected to make any further orders in the case."

We have already seen that by the first section of the act of the Legislature approved May 17th, 1877, heretofore quoted from, power is given the court to grant alimony in proceedings for separate maintenance as in cases for divorce.

We are clearly of the opinion that the contention of the ~~appellant~~ plaintiff in error, in which he insists that the chancellor had no right to enter a further order for temporary alimony and expense money pending the first appeal, is not well founded.

It is also argued by ~~appellant~~ plaintiff in error that the order entered in this proceeding abrogated the previous order and for that reason the order of the court should be reversed. It will be remembered that this appeal involves temporary alimony for the maintenance and support of the ~~appellee~~ defendant in error and for solicitor's fees. Even though the order of the court may have released the ~~appellant~~ plaintiff in error from paying under a previous order entered, the ~~appellant~~ plaintiff in error can have no serious objection because it has not harmed him.

~~Appellant~~ Plaintiff in error in his statement says that he has filed a cross bill. From what is said in his answer and from the allegations of his cross bill, (neither of which appears to have been abstracted) ~~appellant~~ plaintiff in error is going to insist that the alleged marriage be annulled. This can only be determined upon a hearing of the case on its merits.

In view of the state of the record the order entered herein by the circuit court of Du Page County is affirmed.

Order affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 622

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 7 - 1932

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A.D. 1931

Gen. No. 8455 Ag. No. 43

Lincoln B. Evans,

Appellant,

vs.

Appeal from the Circuit Court of LaSalle County.

Frank J. Reinke Motor Sales and Commercial Credit Trust,

Appellees

JETT, J.

Lincoln B. Evans, appellant, instituted suit in a Justice of the Peace Court against Frank J. Reinke Motor Sales and Commercial Credit Trust, appellees, to recover the possession of an automobile. A trial was had before the Justice of the Peace with a finding in favor of appellees and appellant prosecuted an appeal to the Circuit Court where a jury was called to hear the case. After the testimony on the part of the appellant had been heard, the court directed a verdict in favor of appellees and against the appellant and the appellant prosecuted this appeal to this court.

The record discloses that Lincoln B. Evans, appellant, purchased an automobile from Rigazio Motor Co. and entered into a conditional sales contract. The conditional sales contract was executed at LaSalle, Illinois, on May 25th, 1929, by the appellant and delivered by him to the Rigazio Motor Co., upon his purchase from the said Rigazio Motor Co. of the Roosevelt automobile, which is the subject of this litigation. The conditional sales contract among other things provided that "The time purchase price which is $1189.40, of which $365.00 on or before delivery of car has been paid in cash *** and the balance of $824.40 is owing and for which a note of even date, payable in twelve equal monthly installments commencing one month from date, has been given to the seller. ***"Title

Gen. No. 6435

Lincoln B. Byram,

Appellant,

vs.

Appellee.

Part, J.

to said car shall remain in the seller until all the amounts due hereunder are fully paid in cash. Said note or this contract may be negotiated or assigned *** without passing title of said car to purchaser." "If purchaser should fail to pay said note or any installments thereon, or breach this contract, *** seller or his representative may take possession of said car *** wherever it may be found, and may enter any premises therefor without notice or demand to purchaser and without legal process, and purchaser waives all claims for damages caused thereby.***"

On the back of the conditional sales contract was a printed assignment to appellee, Commercial Credit Trust, which was signed, "Rigazio Motor Co., by Tony Rigazio, Prop." and dated May 25th, 1929.

The note, executed and delivered by the appellant to the order of Rigazio Motor Co. bears date of May 25th, 1929, and is for the sum of $824.40, payable in twelve monthly installments of $68.70 each on the 25th day of each month beginning on the 25th day of June, 1929, and providing acceleration of due date of entire balance upon default in payment of any one installment. On the back of this note is an assignment to appellee, Commercial Credit Trust, signed, "Rigazio Motor Co., by Tony Rigazio."

On the hearing of the case it was stipulated that there had been but one payment made on the note in question. The installments due during the months of July, August, September and October were delinquent and unpaid.

Appellant argues a number of reasons for a reversal of the judgment.

Appellant insists that the Commercial Credit Trust, by T. Carter, its agent, on November 18th, 1929, broke into the garage in the rear of his home at LaSalle, Illinois, and took the car and placed it in the garage of Frank J. Reinke, one of the appellees. Appellant takes the position that by reason of the manner of obtaining the car, he is entitled to recover the same in an action of replevin.

The appellant could recover only upon the strength of his own title and his right to immediate possession, and if such title and right to possession are denied, the burden was upon him to show affirmatively a general or special title entitling him to immediate possession of the property. Commercial Credit Tr. 251 Ill. App. 469; Pease vs Ditto, 189 Ill. 456; and Constantine vs Foster, 57 Ill. 36.

It was immaterial to inquire into the manner in which appellees acquired possession. If appellees, Commercial Credit Trust, in entering the premises of appellant and re-taking possession of the car, used unlawful force or created a breach of the peace, it might have thereby submitted itself to liability for damages in an appropriate action.

It will be remembered that this suit was begun in a Justice of the Peace Court. It is quite apparent from the transcript of the proceedings before the Justice of the Peace, that the defense of title and right to possession in appellees, and denial of the same in the appellant was there made. Upon appeal from the justice court and trial de novo in the Circuit Court, upon proofs offered by the respective parties, the allegations and counter allegations of the parties were by word of mouth. Accordingly the issues were made up from the contentions of the respective parties to the proceedings. From what the record discloses the material issue then before the court in the trial of the cause was, whether the appellant had such a general or special property right in the car as to entitle him to its immediate possession.

It is also argued by the appellant that the court improperly instructed the jury to find the right of possession was in appellees for the reason that upon motion of the appellees to exclude the evidence from the jury, all the evidence was thereupon stricken from the record, leaving nothing on which the trial court could base a verdict and judgment. This contention of

of appellant overlooks the nature of a motion to exclude the evidence from the jury. Such a motion is in legal effect the same as a demurrer to the evidence and operates as a tentative admission of all of the evidence in favor of appellees, together with all the ligitimate inferences therefrom, for the purpose of presenting to the court a question of law. Frazer vs Howe, et al, 106 Ill. 563.

It is also insisted by the appellant that a number of the jurors in the Circuit Court were women, and that by reason of that fact any verdict that may have been rendered by a jury composed, in part, of women was illegal and any judgment rendered upon a finding of a jury composed, in part, of women should be reversed. It is conceded that at the time the cause was tried in the Circuit Court women composed, in part, the panel on the trial and were not legally qualified to act as jurors. Such disqualification, however, would not vititate the entire jury or render any verdict they gave void. Appellant having engaged in selecting the jury from the panel as organized, and having proceeded to trial without interposing any challenge, either to the array on the ground of an improper organization of the panel or of the cause of the disqualification of each individual woman juror, appellant must be held to have waived any objections he might have taken by proper and timely challenges. Since appellant failed to preserve his record in the trial he is not in a position to predicate reversible error upon the fact that several of the persons who sat upon the panel at the trial of the cause in the Circuit Court were women.

In conclusion, we are of the opinion that the trial court properly excluded the evidence in favor of the appellant from the jury, and directed the jury to find the issues for appellees for the reason that appellant failed to introduce any evidence tending

to show title and right of possession in himself; that the appellant waived any objections he might have taken to the jurors by a proper and timely challenge; that the trial court properly ordered the return of the automobile to the appellees and that no reversible error was committed in the trial of the case.

The judgment, therefore, of the Circuit Court of LaSalle County will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

1297

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 622⁴

BE IT REMEMBERED, that afterwards, to-wit: On JUN 7 - 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1931

The People of the State of Illinois,
Defendant in Error,

vs.

George Powell,
Plaintiff in Error.

Error to the County Court of Iroquois County.

WOLFE, J.

On August 9th, 1930, the State's Attorney of Iroquois County filed an information in the County Court of said County charging the defendant, George Powell, with the violation of the Illinois Prohibition Act. The first count charged the defendant with the possession of intoxicating liquor, and the second count will selling the same. The information is sworn to by George F. Moore. Trial was had before a jury, which resulted in finding the defendant guilty on both charges. The court sentenced the defendant to pay a fine of $100.00, and to serve four months at the State Farm at Vandalia. The case comes to this Court for review.

Moore, the man who swore to the information, testified that on August 4th, 1930, he purchased a five gallon can of alcohol from said Powell, and August 8th he bought another five gallon can of alcohol from him. That at the time he purchased the last can of alcohol the plaintiff in error and Moore had a conversation relative to the amount of pints that Moore could make out of this five gallon can of alcohol by diluting it one-half. The evidence further shows that after Moore purchased the last five gallon can of alcohol mentioned a search warrant was issued and delivered to the sheriff for service; that on the evening of August 8th, the sheriff and his

deputy raided the home of Powell by virtue of the search warrant issued on the affidavit of Moore. At the time of the search the sheriff found a granite coffee-pot that contained about one-half gallon of liquor which the witness called grain alcohol 'booze,' etc.

There is no dispute but that the coffee-pot containing the liquor was found on the premises of the defendant. The defendant strenuously insisted, however, that he did not sell either of the cans of alcohol to witness Moore.

It is insisted by the plaintiff in error that the verdict is not supported by the evidence and that there is no evidence that any of the liquor in question was fit for beverage purposes. The jury that heard the case had an opportunity to see and hear the witnesses when they testified. They were in a better position than a reviewing court to say what witnesses are worthy of belief. They heard Moore and the officers testify. One of the witnesses was the defendant himself. They have found the issues against the defendant. There is enough evidence and circumstances in the record to be submitted to a jury for their determination whether the liquor was intoxicating and fit for beverage purposes, and in our opinion the verdict should not be disturbed.

It is next insisted that People's instruction No. 3, given to the jury is erroneous. We find no serious objection to this instruction and we think it was proper to give to the jury. Complaint is also made to the giving of People's instruction No. 6. This instruction relates to the weight that should be given to the testimony of the defendant. Plaintiff in error relies upon the case of the People vs. Washington, 327 Ill., 152, as sustaining their contention that this form of instruction is erroneous. The instruction given in the Washington case lacks an element that the instruction given by the court in this case contains, viz: "That the tests that are to be applied to the weight of the

testimony of the defendant shall be the same as are applied to any other witness. The instruction is not subject to the criticism that the plaintiff in error makes.

We find no error in this case and the judgment of the County Court of Iroquois County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 622[5]

BE IT REMEMBERED, that afterwards, to-wit: On JUN 7 - 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1931.

Edward Erhart,
Appellee,
vs.
Henry Genslinger,
Appellant.

Appeal from the Circuit Court of LaSalle County.

WOLFE, J.

Appellee filed suit in the Circuit Court of LaSalle County, charging that the defendant -appellant here- with the negligent operation of a certain truck of the defendant's whereby the plaintiff was injured. The case was submitted to a jury on two additional counts to the declaration. The first additional count charges that the steering gear of the truck of the defendant was not in safe condition and that the defendant knew of that fact. The second count of the declaration charges the defendant with the negligent operation of the automobile. Each count charges that the plaintiff at all times was in the exercise of due care and caution for his own safety; that by reason of negligence of the defendant, the plaintiff was injured. The case was tried by a jury and found in favor of the plaintiff and assessed his damage at $1191.20. The case is brought to this court on appeal for review.

It appears from the evidence that the defendant had driven to Chicago with his truck and delivered a load of merchandise, and as he was leaving the City of Chicago he met the plaintiff. The plaintiff got into the truck of the defendant and they were driving to their homes in LaSalle, Illinois . When nearing the City of LaSalle the truck ran off the road into a ditch, and the plaintiff was injured.

The first assignment of error is that the verdict is not sustained by the evidence in the case. On account of the fact

Edward Crumrt,
Appellee,
vs.
Henry Ormsinger,
Appellant.

NOTE, 1.

that this case must be reversed for other reasons, we do not deem it advisable to discuss the weight of the evidence. During the examination of the witnesses and in arguments to the jury, counsel for the appellee strongly intimated to the jury that the defendant Genslinger was not the true defendant, but that the case was being defended by an insurance company. Objections were sustained as to a part of this argument and also as to some questions that were asked of the various witnesses. Some of the questions and answers were stricken out. Appellant now insists that this is reversible error as it was very prejudicial to the rights of the defendant. This practice of getting before the jury the fact that the case is being defended by the insurance company has repeatedly been condemned by our courts and in some instances the cases have been reversed for this reason alone. -Volkmann vs. Brossman, 129 Ill., 182; Emery Dry Goods Co., v. DeHart, 130 Ill. 244, McCarthy v. Spring Valley Coal Co., 252 Ill. 473. No doubt, under the circumstances, if the appellant had asked to have a juror withdrawn and the case continued, it would have been error for the court to refuse it.

Complaint is made of the plaintiff's given instruction No. 3. This instruction starts out by telling the jury the substance of the additional count of plaintiff's declaration. The part that is especially objected to by the appellee is that part of the instruction as follows: "While on the public highway from the City of Chicago to the City of LaSalle, said defendant's truck was driven or unavoidably was ran off the concrete portion of said public highway and against some obstruction at the side thereof and was thereby over-turned and the plaintiff was injured, etc." The instruction then proceeds to tell the jury the contents of the second count of the declaration and closes as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff has sustained injuries and find from a preponderance of the evidence that the plaintiff has proven the

allegations of either the first or second additional counts of the declaration, then they should find the defendant guilty." This instruction informs the jury that if the truck unavoidably ran off the concrete portion of said public highway and the plaintiff was injured, then the jury should find in his favor. This is certainly not the law. The instruction refers to no negligence on the part of the defendant. Before the plaintiff could recover under the first count of the declaration, the injuries to the plaintiff must be the proximate result of the defective steering gear of the defendant's automobile. This instruction would make the defendant the insurer of the safety of the appellee when he was riding as a guest in the defendant's car. This is not the law. - Chicago Railway Co., v. Shaw 220 Ill., 532; Barnett v. Levy, 213 Ill., 129; and many other cases might be cited sustaining this doctrine. The law is that the driver of a car is only obliged to use ordinary and reasonable care not to injure his guest. For the reasons above stated the judgment of the LaSalle County Circuit Court is hereby reversed and the case remanded.

Judgment reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On JUN 7 - 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8457 Ag. 11.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1931.

Phoenix Finance Corporation,
Limited, a Corporation organized
and doing business under the laws
of the Dominion of Canada,
Appellant,

vs.

Appeal from the Circuit
Court of Boone County.

Charles R. Kleber, individually and
doing business as Kleber Coal Co.,
Appellee.

WOLFE, J.

The Phoenix Finance Corporation, Ltd., in the regular course of business makes loans to its customers, purchases securities, discounts notes, trade acceptances and commercial paper generally. The Sterling Materials Company is engaged in the business of selling roofing material. Their principal office is located in New York City. The defendant, Charles R. Kleber, is engaged in the retail coal business and resides in Belvidere, Illinois. On or about March 25, 1927, the Sterling Materials Company sold the defendant merchandise consisting of different kinds of roofing materials. At the time the materials were delivered to the defendant, the Kleber Coal Company, the Sterling Materials Company sent a statement of account giving the defendant the privilege of taking advantage of certain discounts for cash, or, if the same were not taken advantage of, then Kleber was requested to sign certain trade acceptances, which were sent to him, together with the statement just mentioned. There was correspondence back and forth relative to these trade acceptances, and on April 14, 1927, the defendant Kleber wrote the Sterling Materials Company to the effect that it was his understanding that if he made quick sales of the roofing materials he could pay for the same as the sales were made. He returned the acceptances to the Materials Company,

Phoenix Fireproof Corporation,
Limited, a Corporation organized
and doing business under the Laws
of the Dominion of Canada,
plaintiff,

vs.

Charles H. Tucker, individually and
doing business as Tucker Coal Co.,
defendant.

NOTE, 1.

The Phoenix Fireproof Corporation, Ltd., in the regular course of business makes loans to its customers, procured undoubted, discounts notes, trade acceptances, and commercial paper generally. The Sterling Materials Company is one customer of said roofing material. Their principal office is located in New York City. The defendant, Charles H. Tucker, is engaged in the retail coal business and resides in Baltimore, Illinois. On or about March 15, 1927, the Sterling Materials Company sold the defendant merchandise consisting of different kinds of roofing material. At the time the orders were taken [illegible] the defendant, the Tucker Coal Company, was entering [illegible] sent a statement of account giving the customary [illegible] taking advantage of certain discounts for [illegible], it was were not taken advantage of. [illegible] certain trade acceptances, which were sent to [illegible] the statement just mentioned. [illegible] force relative to these trade acceptances, and on April 15, 1927, the defendant Tucker wrote the Sterling Materials Company [illegible] effect that it was his understanding that if the [illegible] of the roofing materials could not fit the size [illegible] were made. It returned the acceptances to the [illegible]

and in his letter said: "Can see no reason for signing and returning trade acceptances."

On or about April 21, 1927, a salesman employed by the Sterling Materials Company called on the defendant Kleber at his place of business in Belvidere, Illinois. The salesman told Kleber that he represented the Sterling Materials Company, and that Kleber would have to pay cash for materials or sign the trade acceptance, and that he would have ten days in which to make the payments. The evidence shows that there was considerable conversation back and forth between the salesman and Kleber, but finally Kleber signed the trade acceptance.

The trade acceptances were negotiable in form and were for a valuable consideration assigned to the Phoenix Finance Corporation, Ltd. The notes were not paid when due, and the Phoenix Finance Corporation brought suit against the defendant Kleber in the Circuit Court of Boone County to recover on the same. Trial was had and the jury found the issues in favor of the defendant.

The defendant Kleber admits that he signed the trade acceptances, but contends that at the time he signed them he was induced to do so by the fraud and circumvention of the agent of and salesman for the Sterling Materials Company. Kleber contends that he absolutely refused to sign the trade acceptances when requested to do so both by the company itself and the salesman that was sent to negotiate a settlement in regard to the matter. Kleber testified that the agent told him that the trade acceptances which were signed were not, in fact, trade acceptances, or promises to pay, but were only receipts to show that he had received the goods from the Sterling Materials Company. The question whether or not Kleber was induced to sign these trade acceptances by the fraud and circumspection of the Sterling Materials Company was practically the only question involved in this suit. The jury has passed upon that question and found the issues in favor of the defendant.

and in his letter said, "You are to proceed to ship-
ping trade acceptances."

On or about April 8, 1917, a salesman employed by the Waterville Company called on the Enterprise Tanner & Dye plant in Deerhaven, Illinois. The salesman told Dyer he represented the Waterville Company, and that Dyer would have to pay cash for whatever he ordered or else the trade acceptance, or that he would have the duty in order to meet it promptly. The evidence shows that there was considerable correspondence back and forth between the salesman and Dyer, the latter always the trade acceptance.

The trade acceptances were dated April 15, 1917, and were payable sometime in May, 1917. The Enterprise Company, Dyer, refused to accept them, and the Waterville Company brought suit against the Enterprise Company to recover the amount of those drafts or bills of exchange. This suit was brought in the county where the Enterprise Company was located.

The defendant Enterprise Company did not deny that it had ordered the goods, but contended that at the time it ordered them it thought it was to be shipped on consignment, and that it was induced to sign the trade acceptances by the fraud and misrepresentation of the agent of the Waterville Tanning Company. The evidence showed that the agent of the Waterville Company induced Dyer to sign the trade acceptances by telling him that the Enterprise Company would be given a settlement in regard to the matter. Dyer testified that the agent told him that the trade acceptances would be paid (1917). In fact, trade acceptances, as pointed to you, are not paid until they are due. The evidence in the case also showed that the Waterville Company was financially unable to pay the trade acceptances when they were due. The question involved in this case is whether these trade acceptances, by the fraud and misrepresentation of the agent of the Waterville Company, are void or voidable. The fact that Dyer signed the trade acceptances resulted in this suit. The jury found the issues in favor of the defendant.

In addition to the general verdict rendered by the jury, a special interrogatory was, at the request of the plaintiff, submitted to the jury for their answer, and which was answered by them, "Yes." The interrogatory is as follows: "Was the signature of the defendant to the instrument in writing purporting to be trade acceptances, and to each of them, in evidence in this case, procured by the fraud and circumvention of the agent of plaintiff's assignor or assignors?" A reading of this interrogatory discloses that this was the theory upon which the case was tried, and the jury was especially instructed in regard to this issue. Unless this court can say that the jury's finding is manifestly against the weight of the evidence we would not be justified in setting aside their verdict. The jury who saw and heard the witnesses testify is in much better position than a reviewing court to weigh the evidence and decide which witnesses are more worthy of belief. From the facts and circumstances in evidence we cannot say that the jury's verdict in this case is not correct.

Fraud must be proven before it is available as a defense to a suit, but if the fraud is such that it inheres to the execution of an instrument, then it is a void instrument in the hands of third parties. In the case of the Chicago City Railroad Company vs. Uhter, 212 Ill. 176, our Supreme Court, in discussing the different kinds of fraud, say: "There is another kind of fraud, however, for which a release may be impeached, and that is fraud which inheres in the execution of the instrument; that is to say, where the signer of the instrument is deceived into signing it by the belief that he is signing something other than that which he does really sign. Cases of this kind arise where the instrument is misread to the party signing, or where there is a surreptitious substitution of one paper for another, or where, by some trick or device, a party is made to sign an instrument which he did not intend to execute; and, where this is the case, the nature of the instrument signed is not fully understood by the party signing it. Where fraud of

the latter kind exists, that is fraud in the execution of the instrument itself, it may be shown in an action at law." (Papke v. Hammond Co., 192 Ill. 631).

In our opinion the defendant Kleber has shown that there was fraud in the inception in these trade acceptances and, therefore, the plaintiff should not recover in this suit.

Complaint is made that the court erred in refusing to give the instructions offered by the plaintiff, but we find no reversible error in the action of the court in refusing to give the same. Complaint is also made as to the introduction of certain evidence, but under the issues as presented by the pleadings, and of the theory upon which the case was tried, we think no error was committed. We find no reversible error in the case and the judgment of the Circuit Court of Boone County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS. }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof. I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa. this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____ .

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.
Hon. FRED G. WOLFE, Justice.
Hon. JAMES S. BALDWIN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

266 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On JUN 7 - 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8486 Ag. No. 17

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1931.

Barney Doll,
Appellee

vs.

Appeal from Circuit Court
of Stephenson County

Charles Haas and Andrew
Haas,
Appellants

WOLFE, J.

Barney Doll, the appellee herein filed his declaration consisting of three counts, to the June Term of the Circuit Court of Stephenson County, Illinois, against Charles Haas and Andrew Haas, the defendants below, who are known as appellants in this court, charging appellants with knowingly and wilfully permitting their cows, which were known to them at that time to be diseased to mingle with the cows of the plaintiff, whose cows were free from any disease.

The counts are similar in substance and charge that on March 1st, 1929, and for a period of two years thereafter, the appellee was a tenant of appellants' under and pursuant to a certain lease, whereby, among other things, it was agreed between them that each should furnish sufficient cattle to properly stock said farm; that the share of stock furnished by each party should be of equal value. The counts charge that appellee owned and possessed twenty-four milk cows and heifers, sound, healthy and productive; that appellants were possessed of a similar number of cows which were not then and there, sound and healthy and free from infectious or contagious disease; that the fact was well known to both appellants, and that the cows and the cow barns on said leased premises were infected with germs of some infectious and contagious disease, and that the

No. 8438 No. 87. 17

appellants then and there well knew that fact; that the appellee did not know of said disease germs in said cow barn, or in said cattle owned by the appellants; that neither of the appellants told appellee of the existence of said disease germs in said barn or in the cattle of the appellants, but, on the contrary concealed the facts from the appellee; that appellants did knowingly, wantonly and negligently permit said infected cattle owned by them to mix with the healthy cattle of the appellee; that because of said negligent, wilful and wanton conduct of the appellants, the cattle of the appellee were infected, whereby the appellee has sustained damages to the amount of $10,000.00.

To each of the counts of the declaration the defendants filed a general demurrer, which demurrers were overruled by the court. Proper exceptions were preserved by the appellants to this order of the court. On motion of the appellants a bill of particulars was filed in substance as follows: "The disease, ailment, infection, or contagion communicated to appellee's cattle is sometimes known and defined and referred to as 'garget'; also sometimes known and referred to as 'mamitis', contagious and infectious mastitis; that said disease is also known and referred to as inflammation of the udder. The disease in general terms being one cause of impairment of the milk functions of cows and causes them to produce stringy, clotted, bloody and impure milk not fit for human consumption, and entirely unmarketable."

Appellants filed a plea of the general issue and notice under the same. By their pleas they denied the supposed trespass, or charges laid against them. In the notice under the general issue the appellants charge the appellee with numerous acts of mismanagement of the premises where the cattle were kept. They also charge the appellee with many acts in the treatment and care of the cattle which was liable to cause the disease. They deny specifically that they had any knowledge of any infection in their herd of cattle, or barns, at the time the cattle were intermingled.

The appellants were the owners of several farms in Stephenson County. Appellee in partnership with one Gillon had been a tenant on one of these farms for a period of eight years prior to March 1, 1929. Gillon and appellee dissolved partnership just prior to that date, and in the division of cows, the appellee took nine for his share. Prior to moving onto the farm in this suit, appellee increased his number of cows by purchasing others until he had approximately twenty. Appellants had the same number of cows on the farm onto which appellee moved March 4, 1929. Prior to March 1, 1929, appellants and appellee had entered into a lease whereby the lessor was to put in one-half the cows, and the lessess the same. In general the lease provided that each of the parties were to furnish half of the live-stock, and the increase of the live stock and the production of milk was to be divided equally. Appellee took his cows with him when he moved onto the farm, and milked all of the cows and had possession of and managed the farm. In the fall of 1929, appellee again leased the farm for a period of one year beginning March 1, 1930, and kept the same cows that were on the farm at the expiration of the 1929 lease.

The appellee introduced evidence tending to show that soon after he had moved onto the premises and the cows of the different parties became intermingled that he noticed that some of the cattle were diseased and were giving bloody milk. He called a veterinary to examine the milk and he diagnosed the trouble as being caused by mamitis. The employees of the appellee gave their version of the condition of the cattle and the condition of the milk. The appellants introduced evidence to show that they had no knowledge of any disease being in their cattle at the time of the mingling of the cattle under the lease, or had ever been diseased, and that their cattle were all free from disease on March 1, 1931, at the time of the expiration of the tenancy of the appellee. The case was tried before the jury who found in favor of the appellee and assessed his damage at $2500.00 and the case comes to this court on appeal.

It is insisted by the appellants that the lower court erred in not directing a verdict for them, for the reason that the declaration does not state a cause of action. In our opinion the objection is well taken as to the first count of the declaration as it does not charge that the defendants had any knowledge that the cattle of the appellants were infected with a contagious or infectious disease at the time complained of. We think that the second and third counts of the declaration, however, do state a good cause of action, and it was not error for the court to refuse to direct a virdect in favor of the appellants.

It is next insisted that the verdict is contrary to the weight of the evidence in the case. The evidence in support of the allegation that the defendants, or either of them, had knowledge that their cattle were infected with disease is very, very meager; however, this is a question of fact for the jury to decide and we do not feel disposed to reverse the judgment on the ground that it is contrary to the weight of the evidence. It is the peculiar province of the jury to pass upon and dispose of questions of fact and the reviewing court is generally not justified in reversing a verdict, unless it can say that it is manifestly against the weight of the evidence, even if by reading the evidence the court should be of a different opinion relative to its weight from that which the jury found to be the fact.

The plaintiff in testifying relative to the value of his cattle testified his cows were worth from $139.00 to $140.00 apiece; that twenty of them would average that much; that the five heifers were worth $270.00; that he sold all of his cattle for $730.00. Over the objection of the appellants appellee was permitted to introduce a bill of sale for a number of these cattle that were shipped to Chicago, and showed the price that the appellee received for them on the Chicago market.

The sales slip was not competent to prove the price for which the cattle sold, and should not have been admitted in evidence. Over the objection of the appellants the appellee was permitted to introduce in evidence a box marked 'cow cure'. One of the employees of the appellee found this empty box in the barn where the cattle were kept. This box was evidently introduced for the purpose of showing that the appellants had knowledge of their cattle being infected. We are of the opinion that the court committed error in allowing this box to be introduced in evidence, as it is clearly shown by the evidence that other tenants were in possession of the barn before the appellee took possession under his lease. There is no evidence to show that the appellants had any knowledge that this 'cure' was ever in their barn, or was used in treating the cattle of the appellants.

The defendants also claimed that the court erred in giving the instructions for the plaintiff and the refusal to give some of the instructions for the defendants. We find no serious objection to any of the instructions given and think it was not error to refuse to give the instructions offered on behalf of the defendants.

A more serious objection is the one that the court did not give the jury any instruction as to the rule of damages they should follow in assessing plaintiff's damages. From an examination of the appellee's testimony relative to the value of his herd of cattle, and even treating his evidence as to what the cattle were worth at the time of the sale of them as being correct, it is difficult for the court to understand how the jury arrived at a verdict of $2500.00. The jury were not instructed in any manner how they should proceed in estimating the damage that the appellee had sustained. It left the jury to decide for themselves in what manner they would estimate the damages. It was the duty of the appellee to tender an instruction to the court so that the jury should be advised what the proper measure of damages should be in a case of this kind. --Keight vs. Eagan, 65 Ill., 235; and Ill. Cent. R.R. vs. Farrell, 86 Ill., 346.

In the above cases cited the question under discussion here was not squarely raised, but it is our opinion that it was reversible error for the court not to instruct the jury as to what should be taken into consideration in estimating the damage the plaintiff had sustained.

For these reasons above stated the judgment of the Circuit Court of Stephenson County is hereby reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

1337

Begun and held at Ottawa, on Tuesday, the third day of May, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present-- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

266 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 7 - 1932

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8498 Ag. No. 20

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A.D. 1932.

The First Iowa State Trust and Savings Bank of Burlington, Iowa, a corporation,
Appellee
vs.
The Bank of Oquawka, a corporation,
Appellant.

Appeal from County Court of Henderson County.

WOLFE, J.

The questions involved in this case arise by virtue of a directed verdict and judgment entered in the County Court of Henderson County, Illinois, upon a trial of what is commonly termed, a trial of the rights of property.

Leon Lemaire in the month of September, 1931 and prior thereto, was a resident of the City of Burlington, Iowa. He owned a large tract of land in Henderson County, Illinois, consisting of about 2000 acres. This farm was being managed and operated by George Richmond, for and on behalf of Lemaire.

Lemaire was indebted to the First Iowa State Trust and Savings Bank of the City of Burlington, in the sum of Sixteen Thousand Seven Hundred Twenty-seven dollars ($16,727.12) and twelve cents. On April 1st, 1930, he executed and delivered a promissory note to said Bank for the said sum of money. This note was due six months after date and was secured by a mortgage on the chattel property of Lemaire. On June 14, 1930, the said Lemaire executed another promissory note to said Bank in the sum of $11,464.79. This note was also due six months after date and secured by a mortgage on the chattel property of Lemaire. On September 19, 1931, and sometime prior thereto, the said Lemaire was indebted to said bank in excess of $25,000.00. The said indebtedness was not secured by a real estate

Gen. No. 8494

The First Iowa State Trust and
Savings Bank of Hamilton, Iowa,
a corporation,

Appellee,

vs.

The Bank of Ogawaw, a corporation,

Appellant.

WOLFE, J.

The question involved in this case arises by virtue of a directed verdict and judgment rendered in the county court of Hendersen County, Illinois, upon a trial of said in commonly termed, a trial of the rights of [illegible].

Leon Demaris in the month of September, 1921 and prior thereto, was a resident of the City of Hamilton, Iowa. He owned a large tract of land in Henderson County, Illinois, consisting of about 2000 acres. This farm was being managed and operated by Dennis Richmond, for and on behalf of Demaris.

Demaris was indebted to the First Iowa State Trust and Savings Bank of the City of Hamilton, in the sum of [illegible] Hundred Twenty-seven Dollars ([illegible]) and upwards. On [illegible] last, 1920, he executed and delivered a promissory note to said Bank for the said sum of money. This note was [illegible] and was secured by a mortgage on the [illegible] property. On June 14, 1920, the said Demaris executed another promissory note to said Bank in the sum of $[illegible]. This note was also due six months after date and secured by a mortgage on the [illegible] property of Demaris. On September 10, 1921, the Hamilton Bank thereto, the said Demaris was credited to said note at [illegible] $25,000.00. The said transaction was not assented to [illegible]

mortgage. On September 19, 1931, and prior thereto, the said Lemaire was indebted to the Burlington Join Stock and Land Bank. The appellee bank had knowledge of this indebtedness.

It appears from the evidence that during the month of September, 1931, the Vice President of the appellee bank had several conversations with Lemaire regarding his indebtedness to said bank and that on September,19, 1931, Lemaire gave the said bank a bill of sale for 9000 bushels of corn. On September 24, 1931, Lemaire gave to the said appellee bank a bill of sale covering the farm machinery and livestock that was located on the farm in Henderson County, Illinois.

These bills of sale convey to the appellee bank a very large part of Lemaire's personal property. The evidence does not disclose that prior to the execution of the bills of sale by Lemaire to the bank that any demand was made by the representative of said bank to Lemaire for a list of his creditors, nor was any affidavit made by Lemaire as to his indebtedness, nor did the appellee bank give any notice to creditors by registered mail or any other manner that it was going to take the bills of sale, or to purchase or take all of Lemaire's personal property.

On September 24, 1931, said Lemaire gave a warranty deed to the appellee bank, conveying to them about 2000 acres of land on which said personal property was located, which land had been previously mortgaged to the bank. On October 7, 1931, Mr. Bunce and Mr. Gerber, both representing and acting for the appellee bank, went to the Lemaire farm where the property described in the bills of sale was located, and advised Mr. Richmond, the manager of the farm, that the bank had bills of sale for the personal property. At this time Bunce and Gerber went over the list of property described in the bills of sale with Richmond, and made inquiry as to the location of the property and took possession of the same.

October 19, 1931, the appellate bank of Oquawka, Illinois, secured a judgment in the Circuit Court of Henderson County against said Lemaire for the sum of $2490.53, together with costs of suit.

On the same date execution was issued on said judgment and delivered to the Sheriff of Henderson County for service. The sheriff made a levy on the property described in the bills of sale and other property that has belonged to said Lemaire. Richmond, who had been farming for and managing the premises for Lemaire was appointed custodian by the sheriff to take charge and care for the property that had been levied upon.

On September 27, 1931, the appellee bank filed with the Clerk of the County Court of Henderson County, a notice of trial of the rights of property. Said notice was directed to the sheriff of said Henderson County on October 28, 1931, and notice of trial of the rights of property was served on the appellant by the sheriff of Henderson County. Subsequently a trial was had and at the conclusion of the claimant's case, the appellant moved the Court to instruct the jury to find the issues for the appellant bank and with this motion the appellant tendered a written instruction. The court denied the motion and refused to so instruct the jury. At the conclusion of all the evidence, the appellant bank renewed its motion to instruct the jury to find the issues for the appellant bank, which motion was again denied by the court. After this motion was denied, claimant, the appellee bank moved the court to instruct the jury to return a verdict in its favor and tendered an instruction with said motion. The contention of the claimant is, that the bills of sale given by Lemaire to the claimant bank, were given only as collateral and were, in effect, chattel mortgages, so they do not come within the meaning of, or in conflict with the bulk sales law. The court granted the motion of the appellee and gave the instructions to the jury to find the issues for the appellee. The jury so found by their verdict. The bank of Oquawka brings the suit to this Court upon appeal.

The parties to this litigation have devoted considerable space to the discussion of whether a chattel mortgage given by a man re-

siding in Burlington, Iowa, when the property is located in Henderson County, Illinois, was properly acknowledged. For a proper adjudication of this case, we do not deem it advisable to discuss this matter. The question to be decided in this record is whether the bills of sale were in effect chattel mortgages. If the bills of sale operated as chattel mortgages, then the trial court was right in directing a verdict for the appellee bank. If they are bills of sale and do not have the effect of chattel mortgages, then the instruction given to the jury to find for the appellee bank was wrong.

The appellant contends that what on their face purport to be bills of sale, are bills of sale and were taken by the appellee, and that said bills of sale are invalid because of the fact that the bulk sales law was not complied with. The appellee does not contend that any notice was given of the creditors of Lemaire, or any attempt made to comply with the bulk sales law, but insists that the bills of sale are only chattel mortgages and their lien is superior to that of a judgment creditor, for they had taken possession of the property before the levy by the sheriff on the execution.

Ralph Bunce, the Vice-president of the appellee bank testified in the case, and appellee's case must stand or fall by virtue of his testimony. His testimony is to the effect that Lemaire, by giving the bills of sale, so placed the property in the hands of the appellee bank; that the bank might make disposition of the property and apply the proceeds received thereon on his indebtedness to the bank; that the said bills of sale were given appellee bank so as to provide means for the security of the payment of the Lemaire indebtedness to appellee; that appellee took possession of the property in the bills of sale for that purpose, before the rights of the appellant had attached thereto, and therefore, the right of the appellee to sell the property is prior to that of the

appellant bank, even though the bills of sale are not acknowledged and recorded in accordance with the chattel mortgage act.

The appellee contends that since the bills of sale were given as security for payment of the indebtedness of Lemaire, to the appellee, they are to be construed in fact as chattel mortgages, and Lemaire, being a non-resident of the State of Illinois, the said bills of sale were duly acknowledged, recorded, etc.

Where the bill of sale, on its face, appears to be regular and is unconditional, and is delivered, the law will presume in the absence of proof showing the contrary, that it is as it purports to be, namely, an absolute sale of the property. Where such a bill of sale is claimed to be a mortgage only, the party alleging such to be the character of the instrument must sustain his claim by evidence sufficiently clear and satisfactory to overcome the presumption of law that it is an absolute sale. Loose, indefinite, unsatisfactory evidence, will not suffice. ---Bently v. O'Brien, 111, Ill., 53; Wittemore v. Fischer, 132 Ill., 206.

The court in the last cited case, in discussing whether a bill of sale absolute on its face could by parole evidence be shown to have been taken as a chattel mortgage where the parties have deliberately given a transaction all the forms of a sale, says, "Slight, indefinite, or unsatisfactory evidence will not be permitted to change its character, but that can be done only by proof which clearly shows that the intention of the parties was that it should be a mortgage, and not a sale."

The evidence in this case fails to disclose that there was ever any agreement, or intention, on the part of the appellee bank, or of Lemaire to return or recover this property to Lemaire upon the payment of the indebtedness to the bank. If there had been such an understanding of this character between Lemaire and the appellee bank, then there would be much force in the contention of the appellee. There is nothing in either bill of sale to indicate that they are not absolute bills of sale. After the appellee bank took the bills

of sale, their representatives went to the farm where the chattels were located and immediately made arrangements to farm the land and premises which had been conveyed to the appellee bank, and were intending to use the horses and implements which were mentioned and described in the bills of sale to do the work. These are circumstances sustaining the theory that the bills of sale were genuine.

The evidence to sustain the contention of the appellee bank that these bills of sale were in fact taken as chattel mortgages and therefore, they need not comply with the bulk sales law, and, that they had taken possession of the property before the lien of the appellant bank attached, is not sufficiently clear and satisfactory to overcome the presumption of law that the instruments purporting to be bills of sale were in fact bills of sale. It is our opinion that the County Court erred in directing the verdict in favor of the appellee and the judgment of the said court is hereby reversed and the case remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

04 abstract
Opinion filed - April 27, 1932.
Rehearing denied - Oct 4, 1932

537

General No. 8581 Agenda No. 37

October Term, 1931

L. F. NAIL, Appellee,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION, Appellant.

Appeal from Jersey

266 I.A. 623

NIEHAUS, P. J.

L. F. Nail, the appellee, brought suit in Trover in the Circuit Court of Jersey County against the appellant, General Motors Acceptance Corporation, to recover damages for an alleged wrongful conversion by the appellant of two Pontiac two-door Sedan Cars which he claims were his property and in his possession at the time of alleged conversion. Appellee's property rights in the two cars in question are based upon his purchase of the same from the Larsh-Brokaw Company at the company's place of business in Jerseyville.

The appellee testified on the trial concerning the purchase made by him, namely, that he made the purchase on November 12th, 1929, and paid for them by two checks. He received a car invoice or bill of sale for each car. At the time of the purchase one of the cars had been in the salesroom of the Larsh-Brokaw Company at Alton, Illinois and the other car was in their place of business at Jerseyville, Illinois. Just before the sale to the appellee, Larsh had driven the car kept in Alton, to Jerseyville and left it at the Company's garage. It was in the garage at Jerseyville on November 12th, the day of appellee's purchase. Brokaw, in speaking of the sale to appellee, testified that: "Nail came down that morning with the idea of purchasing a number of Pontiacs. I made out the invoices. I went to St. Louis right after that. There was a report made of the two cars he was going to buy." They remained at Jerseyville, in the garage of the Larsh-Brokaw Company, for about ten days after the sale to appellee; and that then on November 23rd, 1929, the appellant General Motors

Acceptance Corporation took them away and that when the General Motors Acceptance Corporation took the two cars from the place of business of Larsh-Brokaw in Jerseyville, Illinois, they were informed by an employee of the Larsh-Brokaw Company that the two cars in question belonged to Nail, the appellee. The Appellee Nail at several times demanded the return of the cars; but the cars were never returned.

There is no dispute about the facts mentioned concerning the sale and the alleged subsequent conversion of the cars by appellant; nor not disputed by the appellee, that the appellant was the legal owner of the cars at the time appellee purchased them from the Larsh-Brokaw Company, and that the Larsh-Brokaw Company held the cars under a conditional sales contract from appellant; nor is it disputed that during the years 1927, 1928 and 1929, the Larsh-Brokaw Company made purchases of Pontiac and Oakland cars from the appellant under conditional sales contracts, which conditional sales contracts were made in accordance with Section 23 of the Uniform Sales Act, which provides, that "Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." But it is claimed by the appellee that he is an innocent purchaser for value without any knowledge of appellant's ownership of the cars; and that appellant is estopped from asserting its ownership by conduct which precluded it from denying the Larsh-Brokaw Company's right to sell the cars to appellee. Counsel for appellee insists that he is an innocent purchaser for value, because "although Nail was an officer and director for a period of two years, or thereabouts, of the Larsh-Brokaw Company, he did not know anything about the Larsh-Brokaw Company's method of financing, through appellant, the purchase of cars. *** He may possibly have known that the Larsh-Brokaw

Company was in some manner financing the purchase of cars," but that appellee certainly did not know that "the General Motors Acceptance Corporation, appellant, and not the Larsh-Brokaw Company, held the title to the cars."

There was a short trial which resulted in a verdict finding the appellant guilty of conversion and judgment was rendered on the verdict. This appeal is prosecuted from the judgment.

There is no controversy about the law governing this case, but appellant contends that the judgment is erroneous because the verdict finding it guilty of wrongful conversion is contrary to the evidence. Counsel for appellee state their contention to be that the appellant, "under Section 23 of the Uniform Sales Act, the appellant, holding the title to the automobiles in question but having placed them in the hands of the Larsh-Brokaw Motor Company, a general automobile sales agent having two places of business, and regularly engaged in the sale of automobiles of the kind in question, is estopped from setting up a claim to the automobiles in question, against Nail, appellee, the purchaser in good faith from Larsh-Brokaw."

The controverted question therefore in the case is whether under Section 23 of the Uniform Sales Act the appellant was, at the time appellee purchased the cars in question, estopped from asserting its ownership.

It is conceded by the appellee that the sale in question was not made to an ordinary buyer who knew nothing about the relations existing between the Larsh-Brokaw Company and the appellant and that there were relations existing between the appellee and the Larsh-Brokaw Company which are factors in the determination of the questions presented for review.

The evidence clearly discloses that the appellee was generally familiar with and well informed about the details of

the automobile sales business and the manner of financing cars for that purpose and especially familiar with the manner in which the Larsh-Brokaw Company financed the cars which it sold, including the financing of Pontiac cars by the appellant for the Larsh-Brokaw Motor Company, of which he was one of the organizers and incorporators and for which company he had served as an officer and director, as well as salesman. He had sold his stock to the company in February, 1928, the year previous to the time of the purchase of the cars in question, taking the company's note for the sum of $8,000.00 for the sale price of the stock, and that he still held the note at the time he bought the cars in question, and was therefore financially interested in the company and its business affairs up to the time he bought the two cars in question; and the cars were purchased by him shortly before the Larsh-Brokaw Company went into the hands of a receiver, the Receiver being Harry Brokaw, Secretary and Treasurer of the Larsh-Brokaw Company, who testified that he had sold the cars to the appellee. The appellee's relations with and interest in the company, and his knowledge about how the company transacted its business, and how it financed the cars which they sold, clearly appear from his own testimony. The appellee testified concerning these matters, as follows:

"I was connected with the Larsh-Brokaw Company at one time. Prior to that I was engaged in other automobile business. In 1925. Name of the concern, 'Alton Buick Company.' It was a corporation. I was an officer and stockholder. I gave time and attention to the business. The concern bought automobiles. We financed cars on the floor plan. Don't remember with whom. Was connected with the Buick not quite a year. I spent some time at that agency handling the Buick. I sold cars, or tried to." ******" "I became connected with the Larsh-Brokaw Company in 1926. *** I was one of the organizers. The others were Larsh and Brokaw. It was three or four months between the time I went out of the Buick agency until the Larsh-Brokaw Company was organized. I think they started in business along in March, 1926, if I remember right. Larsh, Brokaw

and myself were stockholders. The stock was divided in three equal parts. ***** I held stock other than my own. I loaned Larsh money with which to buy his stock. He signed it back to me and I held it as security. I continued to hold it until he sold his stock. Some of it was sold Mr. Hope. I delivered Mr. Hope the deed to the stock of Larsh that I held. Larsh sold stock prior to the time he sold to Mr. Hope. I was Vice President of the Larsh-Brokaw Company at the time of organization. Brokaw was Secretary and Treasurer. Larsh was President. We handled Oakland-Pontiac cars. I was with the company two years. Severed my connection February 11, 1928. Larsh, Brokaw and myself were owners of the stock until I sold out February 11, 1928. ****** I sold my stock to the Larsh-Brokaw Company. They paid me with a note. ***** I got a note of the Company and an automobile, a Pontiac Coach. **** The note was signed by the Larsh-Brokaw Company ******** Larsh-Brokaw had one place of business in Alton while I was connected with it. I cannot tell how many cars they carried. I do not know exactly how much business they did in 1926, nor how many cars they sold that year. I did know, but I forgot. I was conducting some of the business. ********* I don't know whether Larsh-Brokaw Company made out any financial statement. I don't think I gave any reports of my financial standing while I was connected with the company. I don't remember. I heard them speak about Larsh-Brokaw making financial statements. I heard Brokaw talk about quarterly statements to the General Motors Acceptance Corporation. I think General Motors Acceptance Corporation, all the time during 1927, financed some new cars. Paid cash for some because we went to the factory and drove them up. Mr. Brokaw tended to the business. **** I went to the factory, Brokaw went along one time. I went several times. ********* They got cars from the factory at other times than when I went along. We also got cars by shipping them. I don't know whether they were paid for before they were shipped or not. Never executed any papers before we got the cars. I didn't have anything to do with that part of it. I can't tell you how many cars we handled in 1927. Don't think we

had as many as 15 cars on hand at any time. I don't know the greatest number of cars we had in 1927. ****** I don't think I sold some cars in 1927. Larsh and I sold several in Jerseyville. I did not sell any down at the place of business. We did not have a place of business in Jerseyville in 1927. I don't remember whether I loaned the company money in 1927. I did loan the company some money at times. I don't remember when. I loaned them money because they said they needed a little money in their business. I don't remember when or how much. The company also borrowed money from the bank. I signed notes for those in 1927. ******* I don't know how much we made in 1927. I do not know how much I loaned them in 1927. I think we just about split even in 1927, the way I remember it. *** I knew about the financial condition of the business other than what Brokaw told me. I saw the financial statements. I don't know when. I don't remember that I ever looked over the cash account. I think I looked over the bills receivable and bills payable. I don't know when. I cannot say that I looked at the books of the company. To find Bills Receivable I think I saw the financial statement. I saw the report Brokaw made out. I can't remember the date. I think the statement showed the amount of bills receivable and bills payable. ******** I think we had the books of Larsh-Brokaw Company audited. I don't remember who did it or when it was done. I did not see the audit. I suppose Mr. Brokaw had them audited. I think we had to make out a financial report. I don't remember who for. I don't know whether it was for General Motors Finance Corporation or not. ***** I was a member of the Board of Directors all the time that I owned stock. *** I never made any investigation as to the financial condition of the company. I don't remember how the value of my stock was determined at the time I sold out. He just offered me so much. And I just sold it. The note that I got for the stock from the company was never paid. ***** Nothing was ever paid on it. Some interest was paid on it, by check, some by note. I don't remember the date nor the amount. ******* At the time I had the transaction with reference to the cars in question, I held the Larsh-Brokaw Company notes

for more than $8,000.00 *** At the time I had the transaction with reference to the cars in question they owed me for stock and some interest money. I don't know when the car that was at Jerseyville on Nov. 11 was brought to Jerseyville, nor who brought it here. The car that was at Alton was brought to Jerseyville November 12th by Larsh. *** I don't know whether in the store room or storage. ****** I don't know that I had ever seen it before that morning. I saw it after it was in Jerseyville. I was in Larsh-Brokaw's office in Jerseyville here on the 12th. I don't know that I was ever in Larsh-Brokaw's place of business at Alton when anybody from the General Motors came to check cars on the floor. I don't know that I ever saw anyone there checking cars. ********* I don't remember when the General Motors took the cars from the Larsh-Brokaw place in Jerseyville. I don't just know the date. It was on Saturday afternoon. *** The checks for $640.00 each that I gave in payment for the two cars that I am suing for in this suit. They represent what I say I paid for the cars. I said the cars were worth $875.00 each. They had not increased in price since I bought them. I did not pay anything on the cars other than what is represented by the check. I got them at a reduced price. Larsh-Brokaw sold them to me at a reduction. I bought them to sell."

It is apparent from the preceding extracts of the testimony of the appellee that he is not in the legal category of an innocent purchaser for value; nor does the record disclose any evidence of any acts or conduct of appellant or its agents by which it is estopped to "assert its title to or ownership of the cars in question." The verdict of the jury is manifestly against the weight of the evidence; and the judgment is therefore reversed and the cause remanded.

Reversed and remanded.

abstract.
Opinion filed - Oct 6, 1932.

54

General No. 8584 Agenda No. 40

October Term, 1931

GRACE I. BARNETT, Appellant,

vs.

EAST LINCOLN FARMERS GRAIN COMPANY, ETC. Appellee.

Appeal from Logan

266 I.A. 624

NIEHAUS, P. J.

In this case the appellant Grace I. Barnett brought suit in the Circuit Court of Logan County against the appellee East Lincoln Farmers Grain Company to recover damages under provisions of Section 31 of Chapter 80 relating to Landlord and Tenant, alleging that the appellee purchased from her tenant, Ed Sandel, some of the corn grown upon the premises demised to Sandel upon which she had a lien under the section of the statute referred to; and that the appellee converted the grain purchased to his own use; and thereby deprived her of the benefit of the lien provided for; that she had a lien on the grain in question for unpaid cash rent; and for damages resulting to her from the failure of Sandel to perform the terms of the lease under which he became her tenant. The appellee filed a plea of tender and with his plea tendered and paid into Court the sum of $142.00 and in addition $11.40 costs, which had accrued to the date of the tender. The plea denied liability for any amount over the amount tendered.

The only question remaining under the pleading was whether the damages which the appellant was entitled to recover exceeded the amount tendered. **Frew v. Illinois Central Railroad Co.**, 57 Ill. Ap. 42. **Goebbel v. C. B. & Q. Railroad Co.**, 149, Ill. Ap. 649. **Illinois Central Railroad Co. v. Cole**, 62 Ill. Ap. 480. **Cassell v. C. B. & Q. Railroad Co.**, 142 Ill. Ap. 593.

There was a trial by jury. At the conclusion of the evidence for the plaintiff, the defendant moved the Court to instruct the jury to find the defendant not guilty except as to the amount of $141.65, plus $11.40 costs. The Court granted the motion and directed a verdict for the plaintiff for the sum of $153.05; and thereupon the jury returned a verdict in accordance

with the instruction of the Court; and a judgment rendered on the verdict. This appeal is prosecuted for reversal of the judgment on the ground that the Court erred in directing the verdict.

The record discloses, that there is evidence in the record which tended to show that the appellant suffered substantial damages not only for failure to pay the amount of the cash rent which was embraced in the verdict but also on account of the failure of Sandel, the tenant, to perform several of the terms of covenants of the lease under which the premises were demised to him, such for instance as the covenant to keep the premises including the hedges and fences in proper and necessary repair; also the covenant to yield up to the appellant the possession of the premises in as good order and condition as when the same was entered upon by the appellee as tenant. It is contended by the appellee that appellant's right of recovery was barred by the six months limitation provided in the statute because she terminated Sandel's lease on the 25th of September, 1929 and the grain in question was not purchased until the 4th day of April, 1930, nine days more than the six months period from the alleged termination of the lease. It may be said with reference to this contention that while it is true that the appellant gave Sandel a notice on the day mentioned that she had elected to terminate his lease and tenancy, and therefore to quit and deliver up the possession of the same to her within ten days, and that upon Sandel's refusal to deliver up the possession, she instituted a proceeding before a Justice of the Peace against him for unlawfully withholding such possession from her, the notice and proceedings however terminating the tenancy never became legally effective because by agreement of the parties, the matter of dispossessing the appellee was dropped and the proceedings discontinued; and Sandel remained in possession of the premises until the end of his term. Under the statute, the six months limitation of the lien does not commence to run until after the expiration of the term for which the premises are demised. In this case the term for which the premises were demised did not expire until February

28, 1930; the purchase of the grain by the appellee therefore came within the six months period. For the reasons stated, we conclude that it was error to direct a verdict limiting the amount which the appellant had a right to recover to the amount of the cash rent due from her tenant.

The judgment is therefore reversed and the cause remanded.

Abstract -
Opinion filed - April 27, 1932.

55 47

General No. 8593 Agenda No. 46

October Term, A. D. 1931

EFFIE E. DARE, Appellant,

vs.

FRANCIS S. DARE, Appellee.

Appeal from Sangamon. 266 I.A. 624[2]

NIEHAUS, P. J.

The appellant, Effie E. Dare, filed a bill for separate maintenance against the appellee, Francis S. Dare, in the Circuit Court of Sangamon County. The bill alleges that "she is a resident of Sangamon County and married Francis S. Dare, defendant, April 28, 1909, at Peoria, Illinois; lived with defendant since then until June 23rd, 1930, when defendant abandoned her; and since that time has been living separate and apart from her without any fault on her part and against her wishes; that two children were born to them during marriage, namely, Francis Sherman Dare, 15 years of age, and Louise Lawler Dare, 14 years of age." The appellee as defendant filed an answer to the bill of complaint of his wife in which he denied that he abandoned his wife without cause and without fault on her part. The case was referred to the Master in Chancery to take the proofs and report his conclusions. After hearing the evidence, the Master reported that "from a careful consideration of the evidence, it does not appear complainant contributed materially to the separation, and in view of the unwillingness of the defendant to return home and resume marital relations, it is the opinion of the Master that the complainant should be entitled to a decree for separate maintenance."

On the hearing of the cause on exceptions to the Master's finding and report, the exceptions were sustained and a decree entered denying appellant's right to separate maintenance. This appeal is prosecuted from the decree.

The evidence of the marital relations and conduct of the parties, and their troubles, appears in the testimony. The appellant testified concerning these matters, as follows:

"My name is Effie E. Dare. *** I married Francis S. Dare April 28, 1909 at Peoria, Illinois. I then worked at Peoria State Hospital, and my husband was working at the Keystone Iron Works at Bartonville. I don't remember his salary at the time; I was drawing $25 a month at the State Hospital, and Insane Asylum.

After our marriage, my husband worked a few weeks for the iron works, then didn't work for a while, then went to work at the Peoria State Hospital where I was working. They gave us a separate maintenance for living outside the institution $15 a month each; I made $40 a month and he made $45 a month. We bought a home two years after that. When we were married, I had around one thousand dollars and Mr. Dare had fifteen dollars. We bought the lot and built our home and I applied my money on this home. We paid between four and five thousand for the home altogether; I had thirteen hundred dollars, and we borrowed one thousand dollars from my brother.

We left Peoria and moved to Alton in 1917 or 1918, and stayed there a year or more. My husband was chief engineer at the Alton State Hospital. Then we moved back to Peoria for less than a year. Then we moved to Chicago for just a few months, then to Dixon from September to December 23, 1921. My husband was mechanical inspector for the State in Chicago and also at Dixon. From Dixon, we moved to Springfield. After we sold the first home in Peoria, we bought another home there for $4000, and sold it for $6000. We came to Springfield December 23, 1921 and moved into the home we are living in now on March 10th, 1922. We bought this home for $3800 and it is owned by my husband and me jointly. Then we improved the home; I don't know what it is worth now. The home is not complete.

I don't know what the rental value is; the home has not been completed as the electrical fixtures are not in. There are just drop lights from the ceiling, but no fixtures. There are fixtures only in the bathroom and one little breakfast nook. We have two children, Francis Sherman Dare, born August 19, 1915, and Louise Lawler Dare, born September 4, 1916. The boy is fifteen, Louise is fourteen, and they live at home with me. They both go to high school regularly. I pay all the expenses of the home. My husband was accustomed to giving me $100 a month for groceries and keeping up the home, before he left home; that was for groceries, cleaning or anything, paper, anything that came up. Outside of this, he bought the clothing, took care of the doctor and dentist bills and other expenses.

My husband left me June 23, 1929, and came back on the following Friday to get his clothes, which he took away. He quit living and co-habiting with me about February 1929, and we have never lived together as husband and wife since that time. I have never given my husband cause for leaving me and have treated him kindly. We had an automobile that was the family car and used for family purposes. I drove the automobile and at one time it was at my disposal. I have not used it since he left home, he took the car with him. It has not been in the home garage since he left; he keeps it at the Power Plant. My husband did not keep the house insured after he left home, and I took insurance out as he failed to renew it. I pay the coal bill and the gas bill. After he left me he paid me $20 for the first two weeks, $35 for the next two weeks, which was in July. In August he sent me $35 for two weeks, only two or three times he sent me $35 and he paid the gas and light bill, and then he paid me $50 every two weeks, but when I sent him the gas and light bill, he deducted that from the $50 and sent me the balance to the penny. I have been paying the gas

and light bills and all expenses of the home. There has been doctor and dental bills since he has gone from home.

I did not give my husband any cause to leave, he did not leave through any fault of mine, nor did I give him any ground for divorce. We never agreed to any separation. My husband acted cool and mistreated me, commencing sometime ago, it began to get real serious about October, 1929. My husband went to work at Kankakee in January, 1929, and would come home on Saturday for a while, and later about every two weeks. He quit working at Kankakee in May, 1929, and was appointed chief engineer for the State Power Plant at Springfield at a salary of $5000 a year. After he came back he treated me cool, he did not have anything to say around the place and would come to his meals and sit down and eat without speaking.

My husband said he would leave, but gave no reason. He left and has not been back home to stay, only once to get the rest of his clothes. ***

When I asked my husband to do anything about the place, he would say he wasn't interested, that he had lost all regard, but he did not say why. He did not accuse me of unfaithfulness or anything like that. He went to dance halls in the City of Springfield. I saw a public notice in the bulletin. ******

I don't know how he used the automobile after he left home, but I know the mileage registered considerably over the week ends, up into the hundreds. ******

Before he left, he came home at all times of the night, up until two o'clock in the morning. This continued for just a few weeks. Previous to this, he was very indifferent, and did not take any interest in anything around the place or talk to me or the children or anybody that was there. In former years he never was out at night, and had treated me kindly. When he commenced staying out at night, he was very cool and indifferent, did not have anything to say to me or take any interest in anything that I tried to talk to him about. *** He would come to the table and not speak to me or the children at all up until he left. I am fifty-two, my health is very poor. I have had one operation recently Doctor Ditmore was the doctor. I have had to have help recently to do the housework."

On Cross Examination the appellant, in answer to questions, testified:

"I did not always talk to him or nag about some woman. ******

I charged him with infidelity; I have seen him with another woman. The woman that is connected with it was in our home and that is where I saw it. I saw him talking to her continually when she was present, directing all the conversation to her and when she wasn't present he was out working on her car and he had nothing to say to the rest of the family unless she was there. She worked in the office with him. It wasn't necessary for him to devote all his time to her when she was around his home. She was a roomer, because he put his daughter out of her room and gave it to her. I told him about my suspicions because he talked to her and fired her car on different occasions. I don't want things carried on in my home before my children. It isn't all the evidence that I had that he talked to this girl. When he got appointed Chief Engineer at the State Power Plant he had not been there very long until he said at home one day he needed a typist. The man that worked there seventeen years didn't need one. He hadn't been at his present job long until he needed a typist and he went to the Secretary of State and recommended this party and got her down there in the office with him. I never saw him make love to her. This is the only woman I talked to him about. My husband without any reason picked up and left our home and went with her.

****

I did not nag him. I didn't suspect, I knew a lot of things. I knew the week she was there; she had not been in the house twenty-four hours until I knew it was her that was breaking up our home, and he was home every evening except one night, before that he was never home and after she was gone he was never home of evenings. He went frequently, every two weeks he went away. *********

My husband did not pay me $100 a month very much of the time. He has been in the power plant here a year last May, during about half that time he paid me $100 a month. Prior to that time he paid me any amount I asked. When he paid me $100 a month, it covered groceries and school supplies for the children and those things. Other expenses are gas and light and clothing and washing machine and a lot of other expense. There is a material difference in my needs and wants when he was paying me $100 a month and living with me and when he was paying me $100 a month since he left. There is one less mouth to feed. The material difference is that he paid the bills. The washing machine wasn't paid up when he left. I don't run grocery bills. There was a clothing bill at Myers Brothers; he paid it up to the time he left. There is a bill now at Myers Brothers for the children's clothing. I am concerned about it because the Credit Bureau and Myers Brothers keep sending me statements. I don't know whether Mr. Dare has paid the dental and doctor bills. There is the children's dental bill around $12. Dr. Maxwell is the dentist and he has not been paid that I know of, nor has been Dr. Ditmore for treating Louise." *********

"I was not caught telling him I would blow his brains out. I told him I ought to kill him a short time before he left."

On Re-Direct Examination the appellant said:

"I told him I ought to kill him because he had been out with that woman at the swimming pool before our little fourteen year old daughter. It was on June 23, 1930. Mr. Dare said he was there. My daughter said he was there, she saw him at the swimming pool. This same woman that roomed in our house was swimming there too. When I spoke to him, he said he had a right to go where he pleased. I first questioned my husband's conduct at Alton when we were living there, because of the way he acted at home there with me and the children. He acted very cold and indifferent and sent us away to my sister's in Nebraska on a vacation. I knew there was something wrong with him, but I did not know exactly what it was until I got back home, when I found out that it was a woman. Her name was Bell Olden. I wrote him the night we were coming home and he did not meet us and we were walking up and when we got in sight of the home I saw him stop the car and pick her up and she got in. He told me about his infidelity. He confessed to me that the woman had been there two nights while I was gone and slept with him, in my own house, in my own bed. I complained of it. When he confessed to me, why we became reconciled. *********

After we moved from Alton, everything went well. I did not nag at my husband while we were living together. To make the home life pleasant, I cooked the meals and kept my house in order, kept the washing and ironing and mending done, anything that was to be done. I had my husband's meals on time and kept a nice clean house. I mended and washed his clothes and made his underwear. I did everything to make his home life pleasant and did nothing I know of to make it unpleasant. My husband is a strong healthy man. After the notice was put in the paper, I could not get credit, neither my husband's credit nor my own credit. My credit was destroyed on account of his advertising he would not be responsible. *********

I would accept him back if he would come back. The home stands open for him.

On Re-Cross Examination appellant testified further:

"I did nothing to send him away from home. I do recall calling him some names before he left. I did not call him unspeakable or vile names."

The appellee testified as follows:

"My name is Francis S. Dare. I am Chief Engineer, Secretary of State's office, in charge of the Power Plant. My salary is five thousand dollars annually. *********

The girl that came to our home wanted to room there; she was changing her rooming place and my wife had roomers and I suggested that she go over and ask my wife. I believe my daughter's room was turned over to her. it wasn't my suggestion; it was just that arrangement was made. I never at any time made love or any undue advances to this girl. As to the testimony about being out to the swimming pool. I think that was June 20, nothing wrong about it. *********

I said at the beginning I tried to work about the house, then I told her I wasn't interested when she brought the subject up. I meant that I wasn't interested because I had too much on my mind, as I was busy working for the State, had a lot of responsibilities. She accused me of being out with other women indirectly, intimating yes. There was no reason or cause for it, for I had not been. Once in a while, she would accuse of me of this. She said she ought to kill me. She accused me of being out to the swimming pool and taking this woman out there and come at me with foul language and called me a God dam son of a bitch and hoar master and I eventually said I was through and would leave just for the interest of the children so they could be brought up in more congenial surroundings. That was my reason for leaving the home. When she talked to me, I never talked back, I don't argue.

As to the episode at Alton, it was understood perfectly that it would never be mentioned again, and I kept my part of it. **** She nagged me when I came in from being out late at night. I made little answer to it."

The evidence is clearly to the effect that the appellee voluntarily abandoned his wife and family and his home; and that he has no intention of resuming his marital relations with his wife nor returning to his home; and that the separation between husband and wife, brought about by the appellee, is permanent. Concerning the trouble between the parties, it appears to have been caused by the appellee's attentions to other women, which in one instance at least, resulted in a violation of his marriage vows and obligations. In reference to the marital disturbance caused by the last woman who appeared upon the scene, the appellant testified that along about October preceding their separation, which was in the following June, the appellee treated her cooly and with a lack of consideration, and would not have anything to say about the place and would come to his meals, sit down and eat without speaking. He commenced staying out at night; did not seem to take any interest in anything that she tried to talk to him about; would

come to the table and not speak to her or the children; that for a number of months preceding the separation, he quit living with her as his wife and did not co-habit with her; and that at the time of the separation he said he would leave but gave no reason. That he left and did not come back home again to stay; but only once to get the rest of his clothes. The reason given by the appellee for abandoning his wife and family is that she unjustly complained about his relations with other women; and that in connection therewith, she called him opprobrious names and said she ought to kill him on that account. The complaints of the appellant concerning the other women had reference to the appellee's assidious attention to a typist who worked in his office, and which he had arranged to occupy a room in their home, the suspicion aroused from the character and extent of these attentions, from the experiences theretofore had with the appellee to such matters before the parties established their residence at Springfield, would make it appear as if she had some reasonable grounds for suspicions. She denies that she called him the names which he testified to, but assuming that she did on one occasion make use of the opprobrious terms mentioned by him, it would not be a legal justification for appellee's abandonment of his wife and children and home, nor for a permanent separation. It is more reasonable to conclude from all the evidence that the real cause of the separation was some other than the one given by the appellee.

For the reasons stated, we are of opinion that the Court erred in refusing to decree maintenance in accordance with the provisions of the statute and dismissing the bill; and the decree rendered is therefore reversed and the cause is remanded with directions to enter a decree providing for such separate maintenance of the wife in accordance with the Statute.

Abstract -
Opinion filed - April 27, 1932.

56 A

266 I.A. 624[3]

General No. 8600 Agenda No. 8

January Term, A. D. 1932

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

HOMER DUNSWORTH, Plaintiff in Error.

Writ of Error from County Court, McDonough County

ELDREDGE, J.

The plaintiff in error waived his right to trial by jury and pleaded guilty to an information filed in the County Court of McDonough County by the State's Attorney in which he was charged with selling intoxicating liquor in violation of the Statute. The Court sentenced him to confinement in the Illinois State Farm at Vandalia for a period of six months and in addition thereto to pay a fine of $300.00 a costs. No Bill of Exceptions has been filed in this case.

The first error assigned is in substance that the Statute constituting the Illinois State Farm at Vandalia and providing for the confinement therein of persons convicted of misdemeanors violates Sec. 8, Art. 2 of the Constitution which provides that no person shall be charged with a crime unless by an indictment of a grand jury in cases where the punishment is imprisonment in

the penitentiary. The third assignment is also to the effect that the Statute is void as it conflicts with the Parole Act and violates said Section. The answer to both of these assignments of error is that this Court has no jurisdiction to pass upon the constitutionality of a legislative act and also that the Supreme Court has already ruled that said Act is constitutional. **People v. Welch**, 331 Ill. 20.

The second assignment of error is that the Court had no jurisdiction to sentence the plaintiff in error to the Illinois State Farm to work out a fine and costs. The Supreme Court has also held otherwise to this contention. **People v. Lavendowski**, 329 Ill. 223. The fourth and last contention is that the sentence is void because the Court did not find the age of the plaintiff in error. Where the record contains no Bill of Exceptions it will be presumed that the plaintiff in error was more than sixteen years of age in cases of this character and that the Court properly exercised his discretion in sentencing him to the State Farm. **People v. Simmons**, 229 Ill. 201; **People v. Lavendowski, supra.** A further answer to this alleged error is that there is no such error assigned on the record.

There is no reversible error and the judgment of the County Court is affirmed.

abstract -
opinion filed - April 27, 1932.

57

266 I.A. 624

General No. 8613 Agenda No. 14

January Term, A. D. 1932

FARRELL STATE BANK, a Corporation, Appellee,

vs.

STELLA HAMILTON and FLOYD HAMILTON, Appellants.

Appeal from Circuit Court, Scott County.

ELDREDGE, J.

On May 24, 1929, Stella Hamilton and her son Floyd Hamilton executed their promissory note for the principal sum of $1980, payable to themselves or either of them or order November 20, 1929 with interest at the rate of seven per cent per annum. The note contains the usual power of attorney to confess judgment. The note was delivered to Powers-Beggs Co. It was endorsed by the makers and by the Powers-Beggs Co. and came into the possession of the Farrell State Bank, appellee. On the 9th day of January, 1931 in vacation, the Bank had entered a judgment by confession in the Circuit Court of Scott County for the sum of $2215.00 and costs. On January 13, 1931 appellants filed their joint and several motion to set aside the judgment, for leave to plead and to stay the execution thereon and also filed in support of said motion an affidavit in which it is averred that the note was given

for the purchase by Stella Hamilton of the capital stock of the said Powers-Beggs Co. of the par value of $2000.00; but that it was also expressly understood and agreed at the time of giving said note that the Powers-Beggs Co. would hold the note until November, 1929 when it became due and if said Stella Hamilton did not then care to keep said stock and pay the note, the deal was to be called off, the stock taken back and the note delivered to said Stella Hamilton; that the said Powers-Beggs Co. in violation of its agreement left said note with the Farrell State Bank of Jacksonville, Illinois, as collateral for its indebtedness and that said Bank at all times knew that the note was given as the purchase price for stock of the Powers-Beggs Co. and of its conditional delivery, without consideration, etc.

The Court entered an order staying the execution and continued the motion to set aside the judgment and for leave to plead until the April Term of the Court. The motion was not heard until the October Term, 1931 of the Court when appellants made a motion to open up the judgment and for leave to plead. The Court upon the hearing of this motion denied the same and vacated the order staying the execution. Whereupon appellants prayed an appeal to this Court which was allowed. No application was made for a Bill of Exceptions.

nor was any obtained or filed. The Court Record also shows that the affidavit filed in support of the motion to open up the judgment, by leave of Court, was amended but the amendment no where appears in the record.

From the earliest days it has been held that affidavits in support of a motion to open up a judgment and for leave to plead cannot become a part of the record and so cannot be considered on appeal unless they are preserved in a Bill of Exceptions. There is nothing on this appeal that this Court can take cognizance of and the judgment of the Circuit Court is affirmed.

Abstract -
Opinion filed - October 27, 1932.

58 17

266 I.A. 624[5]

General No. 8587 Agenda No. 6

October Term, A. D. 1931

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LESTER RICH, Plaintiff in Error.

Writ of Error to the County Court Tazewell County

SHURTLEFF, J:

At the April Term, A. D. 1930 of the Circuit Court of Tazewell County, Plaintiff in Error was indicted by the grand jury of said county for an assault with a deadly weapon, upon one Charles Jones, the language of the fifth court of the indictment being as follows::

> "That Lester Rich the better and more particular name and description of the said Lester Rich being to the aforesaid Grand Jurors unknown, late of the said County, on the 19th day of June in the year of our Lord One Thousand Nine Hundred and Thirty at and within the County aforesaid, being then and there armed with a certain board, the same then and there being a dangerous and deadly weapon, with the said board then and there and without any considerable provocation whatsoever, did unlawfully, wilfully and maliciously make an assault in and upon one, Charles Jones, a human being, then and there being, with intent then and there to inflict upon the person of the said Charles Jones, a bodily injury, contrary to the form of the statute in such case made and provided, and against the peace and diginity of the same People of the State of Illinois."

The indictment was certified to the County Court of said county for trial and, thereafter at the April Term, A. D. 1931, the cause was tried before a jury and there was a verdict and judgment of conviction entered against Plaintiff in Error and a fine imposed in the sum of $250 and Plaintiff in Error has brought the record by writ of error to this court for review.

Two substantial errors are pointed out on this review: **First**, that the verdict does not support the judgment and penalty; and **Second**, that the verdict and judgment are against the manifest weight of the testimony. We shall take these in order. Over the

objections of the defendant, the court instructed the jury: "The Court instructs the jury as to the form of its verdict. If you find the defendant, Lester Rich, guilty of an assault with a deadly weapon, the form of your verdict may be: 'We, the jury, find the defendant, Lester Rich, guilty of an assault with a deadly weapon in manner and form as charged in the . . . count of the indictment.' (Filling in the blank space the number of the count under which you find the defendant guilty)." and the jury found a verdict in the following form: " 'We the jury find the defendant, Lester Rich, guilty of an assault with a deadly weapon in manner and form as charged in the 5th count of the indictment.

Signed—Wade Smelz, Foreman.' "

It is contended that this form of verdict is insufficient to support the judgment and penalty entered and is no more than a verdict upon assault and battery or simple assault. It omits entirely the question of provocation and other matters of fact set out in the indictment and is insufficient. Defendant in Error contends that the reference to the fifth count of the indictment and "as charged in said count" makes the verdict sufficient in form. This question has been passed on in numerous cases; (**The People v. Lee**, 237 Ill. 272; **The People v. Bain**, 279 id. 209; **The People v. Davidson**, 240 id. 194; **The People v. Morton**, 245 id. 530; **The People v. Jackson** 312 id. 612; **and The People v. Lemen**, 231 id. 197.)

In **The people v. Lee, supra**, the form of verdict was as follows: " 'We, the jury, find the defendant Leona Garity guilty of harboring a female under the age of eighteen years in a house of prostitution, in manner and form as charged in the indictment.' " The court held: "But there is here a much more serious objection to the verdict. The verdict does not find, directly or by necessary implication, that plaintiffs in error were the keepers of the house of prostitution or that the female harbored therein was unmarried. These were both essential elements of the offense and constituted material facts in

issue at the trial. If the verdict had been simply, 'We, the jury, find the defendants guilty,' without specifying of what the defendants were found guilty, under the authority of **Armstrong v. People**, 37 Ill. 459, and **Davis v. People**, 50 id. 199, it would be sufficient; or if the verdict had found the defendants guilty as charged in the indictment it would clearly be sufficient under the authority of **People v. Murphy**, 188 Ill. 144, **Donovan v. People, supra**, and many other cases. But the difficulty with the verdict in the case at bar is that it finds plaintiffs in error guilty, and, following the word 'guilty,' the verdict specifically states of what they are found guilty,—that is to say, they are found guilty of 'harboring a female under the age of eighteen years in a house of prostitution.' This language is not broad enough to embrace the finding upon all the essential elements of the offense. Nor could it be said that the reference to the indictment would aid this finding. The plain meaning of the verdict is that the defendants are found guilty of harboring a female under the age of eighteen years in a house of prostitution, as those specific facts are charged in the indictment. The cause in the verdict, 'in manner and form as charged in the indictment,' refers to the indictment for the facts which are specially found in the verdict, and cannot be held to incorporate, by reference, other facts upon which there is no finding. The verdict is insufficient to authorize a judgment of guilty.''

In **The People v. Bain, supra**, the form of verdict was: ''We the jury find the Defendant * * * guilty of allowing Regina Jesse, an unmarried female under the age of eighteen years, to stop and room in a house of prostitution in manner and form as charged in the indictment,'' and the court cites the same reasoning and language used in the Lee case.

The case of **The People v. Lemen, supra**, is in all respects the same as this case, in which the jury found a verdict as follows, '' 'We,

the jury, find the defendant, Julius Lemen, guilty of assault with a deadly weapon with intent to do a bodily injury, as charged in the indictment, and we find the age of the defendant to be . . . years.' " And the court held: "The form given and the verdict returned both referred to the indictment, but the reference did not aid either, since the verdict was only a finding that the assault was committed with a deadly weapon with intent to do a bodily injury, as charged in the indictment, and did not include all that was charged in any count of the indictment or all which would constitute the crime. If the jury had found the defendant guilty as charge in some designated count of the indictment the verdict would have included all the necessary elements of a crime, but as returned the jury neither found that the assault was one where no considerable provocation appeared or where the circumstances of the assault showed an abandoned or maglignant heart." This seems to be the elementary rule laid down by the authorities and we are compelled to follow them. The testimony in this case is extensive. A part of it stated by Plaintiff in Error is as follows: Plaintiff in Error was twenty-six years of age at the time he is alleged to have made the assault. He rented a farm of one hundred thirty acres from his father, Daniel Rich. He lived upon this farm with his wife and child.

Early in the Spring of 1930, he made application to the juvenile probation officers of Peoria County for a boy to assist him in his farm work. On the 23rd of April of that year, Mrs. Florence Merrill, one of the probation officers of Peoria County, sent Charles Jones, then thirteen years of age, and the complaining witness in this case, to the home of the plaintiff in error. This boy, and his five brothers and sisters had been taken from their parents about two months previously because of lack of proper parental care. Immediately prior to going to the home of Lester Rich, Charles Jones had been confined in the Detention Home in Peoria. He was a neglected child, and had

been neglected all his life. He was born in Iowa and for five years of his short life he had been in a juvenile home in that State, prior to being brought to Peoria by his parents. The Plaintiff in Error was to give him a home and teach him to do farm work.

On the 26th of May, just a little over one month after his arrival at the farm, he stole a pocketbook containing fifty dollars, belonging to the Plaintiff in Error. He hid the pocketbook and money by burying it in a corn field aljoining the house. He did this in the day time while the Plaintiff in Error was working in the fields, and while the wife of the Plaintiff in Error was working in the gardens. The boy then ran away. Rich discovered that the boy had left the place and immediately looked for his pocketbook and money and found that they were gone. He saw the boy going down the road about eighty rods away. He started on foot in pursuit. Presently he was joined by a woman in an automobile and by several men to whom he stated the boy was running away with fifty dollars. Rich caught the boy and it is possible that in subduing him he hit him with his hands, or with a switch, though he denies this. He took the boy back to his house and threatened to whip him if he would not tell where the pocketbook and money were. He refused, and Rich hit him with a switch. To avoid further whipping, he then, in the presence of Rich, Tom Riggs and Samantha Riggs, who were witnesses in the case, climbed over a fence into the corn field and dug up the pocketbook and money.

When the boy came to the farm his face was covered with sores and pimples. Plaintiff in Error had procured a salve and had done much to heal these up. The boy was driving a team on a corn cultivator in the field and left the team standing. Later he started the team and ran and jumped on the seat after the cultivator had started, and injured one of his legs back of the knee. This was seen and stated

by Jones to several witnesses. The charge in the boy's testimony is as follows: After supper, Lester and I went out to the barn, and I got up in the hayloft. He told me he was going to give me a whipping for not bringing the cows back fast enough; he picked up a board and rope; we started scuffling; he put his paws in my face and scratched me; he tied me up and started whipping me; his wife came and told him to quit. No one else was there. He whipped me with a board about one inch thick, two feet long and three inches wide. He tied me with a thin rope to a post, facing the post. After he tied me, he whipped me with the board on my back and around my legs. He tried to put his arm around my neck, and put his paws in my face, when we was scuffling, and scratched me. After his wife came and told him to stop, he did stop beating me. It was claimed this occurred on the sixteenth of June, several weeks after the pocketbook was stolen. The boy left the farm on the twentieth of June and ran away. He spent two or three days wandering around in the fields and on Saturday evening came into Deerfield, a small village. As Plaintiff in Error's statement shows, in Deer Creek, he first met a blacksmith by the name of Lewis. He asked Lewis for money with which to get something to eat. Lewis gave him a quarter. He next stopped at the home of W. D. Ferguson. Mr. Ferguson was sitting on his front porch with a caller by the name of Serles. The boy asked for something to eat. He was taken into the house and given a heavy supper. He told

Ferguson and Serles (who died before the trial), that he had walked from a place ten miles east where he had been working for a man named Sam White. He said that he and White were on a wagon and that the team ran away. Ferguson asked him how he got the pimples, and he replied, "Sam White got hurt bad, and that's the way I got the scratch." He said that White was hurt so badly that he, Charles Jones, had to quit the job. He asked for work, and Ferguson directed him to go down to where there were lights in a shop, and that probably he would find a farmer there who would give him work. Ferguson could see nothing the matter with him except the pimples on his face.

The boy walked down the street and met Robert Alexander. He asked Alexander for money with which to get something to eat. Alexander gave him forty cents. He went into a restaurant and Alexander followed him. Alexander testified that he noticed at the time that the boy's face was skinned. Evan Phillips, a witness for the People was in the restaurant and he says that the boy's face and ears were scratched. He says that they stripped him for the purpose of examining him, and that he saw a mark on his back and another mark on the under side of his leg, and one on the front, but that there was no bruise on the back; just a small scratch. He says that probably fifty people were around there. Emil Wurmnest, another witness for the People was also present at the restaurant. He noted that the boy's face was stratched and that one finger nail was partly torn lose, but he does not appear to have been in the restaurant when his clothes were removed.

The evidence is pretty clear as to what started the examination in the restaurant. Mrs. Merrill, a woman of the highest character,

testified that Charles told her that Alexander told him what to say about Rich. The boy was taken to the town hall for further examination.

In the meantime, Lester Rich and his wife and baby had driven into Deer Creek for the purpose of calling on friends. Lester left his car parked at the curb, with his wife and baby in it, and walked down the street. He knew nothing of the storm that was brewing against him until Ewalt Wurmnest, a witness for the People, stepped up in front of him and without saying anything, gave him a violent blow in the face that knocked him out into the street. Rich got up and he was grabbed by a number of people and taken to the town hall where Charles Jones had been taken, and was then engaged in telling his story.

There is a great contrarity of statements as to what took place at the town hall. Some of the witnesses stated that Rich admitted he struck the boy with a board "but did not know there was a nail in it." An equal number deny that Rich made any such statement. The boy was examined by physicians and no marks were shown that would indicate a beating with the board indicated, except the sore on the back of the leg, under the knee, caused by the corn cultivator. Plaintiff in Error did state at the town hall that he mentioned striking the boy with a switch or stick earlier in the spring, when the pocketbook was stolen.

It was stipulated in the record that if any offense was committed in this cause it occurred on the sixteenth day of June, 1930, or not at all. If it occurred as the boy Jones stated, then the witnesses Thomas Riggs, Samantha Riggs and Frank Riggs, father, mother and brother of Plaintiff in Error's wife, committed perjury, in addition to Plaintiff in Error. The boy, Jones, told varied,

different and inconsistent stories of all that took place. The only substantial proof, from a reading of the record, to sustain the verdict is the testimony of the witnesses as to what Plaintiff in Error said at the town hall on Saturday evening, and this is not strengthened by the methods taken to bring that meeting about.

Upon reading the entire record carefully, it does not leave the mind at all clear that the proofs show Plaintiff in Error guilty beyond a reasonable doubt or that the verdict is in accord with the manifest weight of the evidence.

For the reasons stated, the verdict and judgment of the County Court of Tazewell County are reversed and the cause remanded.

Reversed and Remanded.

Abstract.
Opinion filed - April 27, 1932.
Rehearing denied - October 4, 1932.

59 47

266 I.A. 625

General No. 8621 Agenda No. 18

January Term, A. D. 1932

MT. PULASKI AUTO COMPANY, Appellant

vs.

CORDIA STARR, Appellee.

Appeal from the County Court of Logan County

SHURTLEFF, J:

This case has been before this court at a former term, General No. 8487, Mt. Pulaski Company Inc., appellant, v. Cordia Starr, appellee, 260 Ill. App. 637. At the former hearing the court stated the case as follows: "The record in this case discloses that the appellee Cordia Starr purchased a Dort roadster automobile from the appellant Mt. Pulaski Auto Company, for the sum of $750.00, on July 9, 1922; and in payment therefor gave a judgment note on that day for the amount of the purchase price. The appellant took judgment on the note referred to on the 17th day of August, 1929, in the county court of Logan County. Thereafter on motion of the appellee the judgment was opened and leave was given to him to plead in defense; and thereafter the appellee filed three special pleas; in the first plea he averred that he paid to the appellant and that the appellant accepted from him, a certain Dort roadster automobile of the value of the amount of said promissory note; and that the appellant accepted the same in full satisfaction of the note and discharge thereof. The defense in the second and third pleas, is based on the averment therein, that appellee purchased the automobile in question upon the express condition, that the father of the appellee would approve of such purchase; and then and there signed and delivered the promissory note in question to evidence

the purchase price; that the father of the appellee disapproved of his purchase; and that thereupon he returned the automobile to the appellant; and that the appellant received and accepted the automobile as a discharge of the indebtedness represented by the note.

"The trial of the case resulted in a verdict of the jury finding the issues in favor of the appellee; whereupon the court rendered judgment in bar of the action. This appeal is prosecuted from the judgment."

Two juries have now heard the proofs in this case and found a verdict for appellee. The same presiding judge has heard the proofs and seen the witnesses upon the stand and has twice refused to grant a new trial. The record in the first case is not before us, and it is more than likely that appellee submitted additional proofs at the second trial. Appellee's pleas submitted an issue of fact to the jury, any one of which proving true, would be in bar of the action. Appellant's fourth replication submitted a new issue to the jury, which was denied and issue made to the county. This fourth replication was pleaded in bar to appellee's three pleas and in addition raised new matters. The substance of said fourth replication was: "that on to-wit, June 9, 1922, plaintiff sold and delivered to the defendant a certain Dort roadster automobile and defendant accepted and received the said Dort roadster automobile in payment therefor and executed and delivered to the plaintiff his promissory note in said declaration set forth and avers that thereafter said defendant brought to the defendant said automobile and and requested plaintiff for and in behalf and as agent of the defendant to sell the said Dort roadster automobile for the

said defendant and to accept and receive the proceeds of such sale and apply the same as credit and payment upon the said promissory note, and avers that thereafter in consideration of the premises and at the request of defendant aforesaid did sell the automobile of said defendant for its reasonable value and did receive the proceeds of said sale and credit the same upon the promissory note the full amount thereof and that the amount in said declaration set forth and in said judgment entered was and is the amount of said promissory note and the sums therein agreed to be paid for giving full credit thereon for said payment credited as proceeds of the sale of said automobile and avers that thereafter the defendant promised the plaintiff to pay the said sums of money in said promissory note set forth and then and there due and owing after crediting said payment thereon, yet although often requested defendant has not paid the said sums nor any part thereof but wholly refuses so to do."

The original transaction took place and appellee signed said note, due and payable one year after date, on the ninth day of June, 1922. The principal of the note was $750. The Dort car was not sold by appellant until September 8, 1924, and this suit was not started or the note entered in judgment until August 17, 1929. Appellee's father, Fred Starr, died on June 9, 1929, about two months before the suit was started. From the time the note was given on June 9, 1922, and from the time the Dort car was returned to appellant on June 10, 1922, it is conceded by all the witnesses that appellant or any one in its behalf, never made any demand for the payment of the note from appellee or any other person; never notified appellee of the sale of the Dort car, or the price received therefor, or of the indorsement of $425 or any other sum upon appellee's note, and that there was no communication between these parties upon this subject until the entry of said note in judgment

on August 17, 1929.

Three witnesses testified for appellant, Clarence Downing, Floyd Downing and a Mr. Musick, who was selling cars for appellant, the Downings. Appellee testified that for about ten days Musick and Downing had asked him if he didn't want a car and he said he did. Appellee was just twenty-two years of age and was farming in partnership with his father on a small farm. Appellee testifies that he told them he could not buy a car unless his father was willing. Appellee testified that when the note was made by Clarence Downing, as appellee remembers, he told him he was in partnership with his father and could not take the car unless his father was willing. He says Clarence replied: "It would probably be all right." Appellee testifies that when he took the car home his father told him if he kept the car he would forfeit his interest in the partnership, and appellee testifies: "Next day I took the car back to the garage in the morning, between six-thirty, seven or eight o'clock; that was on June 10, 1922; I was out in front of the Mt. Pulaski Auto Company garage on June 10, 1922, about noon; saw the car standing outside on the south side of the door of the building; I saw Clarence Downing standing outside of the garage at that time, I believe. He was about fifteen feet, I should judge, from the car; had a conversation with Clarence at that time. I told him that I could not take the car on account of my father objected to it and he was rather angry and I would lose my place or shares, if I did take it; I told Clarence Downing that my father told me that. Clarence said, 'Well, that won't last very long; probably he will get over that;' wasn't there very long. I don't believe I saw the car after that."

Musick and Floyd Downing drove out and had a talk with appellee's father before appellee took the car home. They did not get much out of appellee's father, but testified he said that it was for the boy to do as he wanted to do. One peculiar thing about the note drawn up by Clarence Downing is that it reads, "We or either of us", and does not purport to be an individual note.

As to the proofs, appellee's testimony as to procuring the assent of his father is contradicted by the testimony of Musick and the two Downings. There are facts and circumstances in the case, which corroborate appellee. There is a direct conflict in the testimony. There can be no question but that the testimony of either appellant or appellee standing alone would support a verdict. In **Nell v. Nell**, 234 Ill. App. 166, this court said: "There was a direct conflict of testimony between the parties, and the jury who were the judges of the credibility of the witnesses, having evidently given credence to the evidence of appellee rather than to that of appellant the only real question involved upon this appeal is as to whether or not appellee's evidence is in law sufficient to sustain the verdict." And again this court said in **Leeper v. Gay**, 253 Ill. App. 183: "The jury heard the testimony, had the witnesses before them, and while the proofs are conflicting we cannot say that the verdict is against the manifest weight of the testimony and appellee is entitled to all the favorable inferences to be drawn therefrom. (**Dick v. Zimmerman**, 105 Ill. App. 615, 616; **O'Brien v. Palmer**, 49 Ill. 72, and **Hess v. Rosenthal**, 55 Ill. App. 324.)

"Inasmuch as the evidence of either side to the controversy, standing alone in the record, would support a verdict, the verdict may be accepted as decisive of the controversy. (**Abrams v. Rideout**, 101 Ill. App. 131; **Watson v. Fagner**, 105 Ill. App. 52, affirmed 208 Ill. 136; **Whitsell v. Rising**, 109 Ill. App. 91.)"

In **Grosch v. Mendota National Bank,** 239 Ill. App. 521, the court said: "Even where there is a conflict in the testimony and the evidence of the successful party when considered by itself is sufficient to sustain the verdict, an appellate tribunal will not set aside the judgment unless it is satisfied that it is manifestly against the weight of the evidence. **Shevalier v. Seager,** 121 Ill. 564; **Chicago & J. Elec. Ry. Co. v. Barrows,** 128 Ill. App. 11."

In **The People v. Egan** 241 Ill. App. 197, the court said: "As to the verdict of a jury where the evidence is conflicting, it was said in the case of **Illinois Cent. v. Gills,** 68 Ill. 317, 319: 'If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence and the facts and circumstances, by fair and reasonable intendement, will authorize the verdict, notwithstnding it may appear to be against the strength and weight of the testimony.' To the same effect are the following cases: **Bradley v. Palmer,** 193 Ill. 15, 89; **Carney v. Sheedy,** 295 Ill. 78, 83; **Blackhurst v. James,** 304 Ill. 586, 592. It has also been held that a reviewing court should not set aside the verdict of a jury merely because there may be a doubt of the correctness of the verdict. **Illinois Cent. R. Co. v. Cowles,** 32 Ill. 116, 121; **De Forest v. Oder,** 42 Ill. 500, 501."

And the court said in **Dowling v. MacLean Drug Co.** 248 Ill. App. 275: "It is true that there is some conflict in the evidence as to how the accident happened. If the proof of plaintiff standing alone is sufficient to sustain the verdict of the jury, then we are not permitted under the law to disturb that verdict, unless we can say

that all the evidence considered, the verdict is manifestly contrary to its probative force. It is the province of the jury to pass upon the credibility of the witnesses, their manner of testifying from their observation of them upon the witness stand, and therefrom to judge as to which of the witnesses were more entitled to credit and to give credit accordingly. In the circumstances environing this court we cannot see the witnesses, nor observe their manner or disposition, nor from their actions judge of their credibility or lack of credibility. These privileges the jury had, and under such circumstances we are not permitted to disturb the conclusion to which they arrived."

And in **Humphrey v. East St. L. & S. Ry. Co.**, 253 Ill. 457, it was held: "Whether the plaintiff is right in his contentions, or the witnesses for the defendant are proper questions of fact for the jury to decide. They had an opportunity to see and hear the witnesses upon the witness stand, and it is for them to judge which witnesses are credible and the ones to believe. They by their verdict have given more credence to the witnesses of the plaintiff and unless it is manifestly against the weight of the evidence this court would not be justified for that reason in reversing the case. We cannot say that the finding of the jury is manifestly against the weight of the evidence in this case." Under all the circumstances we are not prepared to say on this hearing that the verdict is against the manifest weight of the evidence.

The jury found against appellant upon the issue raised by its fourth replication. There are numerous grounds for this finding which have a bearing upon the whole case. If appellant was the agent of appellee to sell the Dort car and apply the proceeds upon the note upon a sale of the car, it was appellant's first duty to

furnish appellee with the details of the sale, a statement of the receipts, the application of the same, and the statement must be of such a character as to enable appellee to make some reasonable test of their honesty and accuracy. (**Chicago Title & Trust Co. v. Ward** 113 Ill. App. 331; **The Illinois Linen Co. v. Hough**, 91 Ill. 63; **Fish v. Seeberger** 154 Ill. 30.) This appellant did not do. No sale of the car was made for two years and three months after the car was returned to appellant, and then was sold to the son of the President of appellant company. The car was never put in the "show room" for sale, but was put in a storage room where prospective buyers could not see it. If appellant's issue raised by the fourth replication was true, it is to be noted that appellant made no storage charges against appellee, but in every way took and kept the Dort car, as though it were the owner of the car. The delay in bringing suit upon this note until six years after it was due, making no demand for payment or renewal until after appellee's father was dead and after the note had been due for six years, fully warranted the jury, if they believed appellee's testimony, in finding a verdict for appellee.

Some complaint is made by appellant as to the second and third instructions given for appellee. We have examined these carefully and do not think they are subject to the criticism made. They merely present the case on appellee's defense as set out in his pleas, and each instruction is based upon the theory, as stated, "if you believe from a preponderance of the evidence that the automobile in question was sold by the plaintiff to the defendant on condition that defendant's father would approve said sale and that the note in question was given to evidence the purchase price of said automobile," etc., and "if you further believe from a

preponderance of the evidence that on the 10th day of June, 1922, the defendant returned the said automobile to the plaintiff and then and there told the plaintiff that his father had disapproved the defendant's purchase," etc. We find no error in these instructions and do not believe the jury were misled by either of them.

Finding no reversible error in the record, the judgment of the County Court of Logan County is affirmed.

Affirmed.

S T A T E O F I L L I N O I S

A P P E L L A T E C O U R T

FOURTH DISTRICT

FEBRUARY TERM, A.D. 1931.

FILED

FEB 1 1932

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 12

Agenda No. 26

HENRY W. NIEMANN,

Appellee,

vs.

THE SECURITY BENEFIT ASSOCIATION, a Fraternal Benefit Society,

Appellant.

Appeal from the Circuit Court of Madison County.

266 I.A. 625

Fulton, William J.,

Anna M.C. Niemann, the wife of Henry W. Niemann, the Appellee, at the instance of J.N.Debow, District Manager of Appellant, The Security Benefit Association, applied for membership in the Granite City Council of that order and was examined by Dr. G.B.M. Erwin, medical examiner for Appellant in the District, including the Counties of Madison and St.Clair. A written application for a policy of insurance containing a great number of questions and answers as to the health and family history of the applicant, was filled out by Dr. Erwin and signed by Anna M.C. Niemann. The policy in which appellee was named as beneficiary, issued under date of April 11, 1928, and was delivered to the applicant by Debow shortly after the date thereof. The insured died of chronic nephritis on the 26th day of August, 1928. Proof of death was duly made and payment refused. The amount stipulated in the policy was $1000.00, which it is conceded was the amount due, if anything .

This action was brought to recover that amount and defended on the ground that there were false statements in the application barring all right of recovery; that applicant failed to sign the certificate after delivery and while she was in good health

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as required by the policy, because of the refusal of the Court to give certain instructions offered by the Appellant, because the verdict is contrary to the manifest weight of the evidence, and the further contention that the knowledge of an, agent engaged in defrauding his principal, is not the knowledge of the principal.

The plaintiff answers these defenses by saying that the District manager and the examining physician were responsible for the alleged false answers and that the truth as to the matters about which those answers were made was known to the agents of Appellant at the time the application was signed and at the time the certificate was issued and delivered and therefore appellant was estopped from making that defense. Also, that the requirement of the certificate and by-laws of Appellant that the certificate be delivered to, and signed by applicant during her good health were conditions which could be and were waived by the conduct of insurer.

The amended declaration, in addition to the usual averments, alleges "that the certificate was delivered to the applicant during her lifetime, the premiums paid to defendant with full knowledge of the defendant that the certificate had not been signed by the applicant, and that applicant was not in good health." In addition to the general denial, appellant filed four special pleas alleging that insured was not in good health when the certificate was delivered; that the certificate was obtained by the insured through false representations as to her health; that her answers to questions in the application as to whether she had ever been in a hospital or treated by a physician or surgeon within five years, were false.

Appellee filed replications alleging that premiums were paid and policy delivered to insured with the full knowledge of appellant that applicant was not in good health at the date of the delivery of policy; that the policy was obtained by said applicant with appellant having full knowledge of the facts concerning treatment of applicant by various physicians, and that she had been in a hospital for treatment of her physical ailments.

The testimony shows without dispute that the insured had been under the care of various physicians for kidney trouble; that she had gone to a hospital for treatment on the advice of one; that she

had had an operation about a year prior to date of application; that she had been rejected by another insurance company, and that she was at that time under a physician's care and taking medicine.

The application in part reads as follows:

"Q. 14.(a) Have you ever been an inmate of any asylum, sanitarium or hospital? (b) If so, give details, when, where, what for and results?

(a) No. (b) ------"

Question 16-a is as follows: "Have you been under the care of, or consulted any physician, suregon or practitioner of any school concerning yourself within the past five years? (b) If so, for what disease or ailment, name and address of each physician, surgeon or other practitioner, and give dates? A No. B -----"

"23. I hereby warrant that no person except the medical examiner and myself were present when this application was being filled out; that I verify the answers to questions 8 to 21 inclusive as written and the same are true and correct.

(Signed) Anna M.C. Niemann."

At the end of application appears the following statement: "As a consideration for the acceptance of this application and the issuance to me of the beneficiary certificate by the Security Benefit Association, I warrant that the foregoing answers and statements are true, full and correct, and I agree that said answers and statements shall be held to be warranties. I further agree if accepted as a member of the Order that this application shall be considered a part of my beneficiary certificate and that I will be bound and my membership contract governed in all respects by the constitution and laws of the Security Benefit Association.*** As a further consideration for the acceptance of this application and issuance of a beneficiary certificate to me, I warrant that I am now in sound physical and mental condition of health.

Dated, Granite City, 9th day of April, 1928.

(Signed) Anna M.C.Niemann."

There was also the following statement signed by Dr. Erwin at the end of the application:

"I hereby certify that no person beside the applicant and myself were present during this examination; that I made a thorough physical examination of Anna M.C. Niemann and from the knowledge obtained thru this examination and otherwise, I class the applicant as first class.***

I hereby certify that the answers to questions 8 to 21, if written by me are those made by the applicant to the questions asked and that such answers were verified by the applicant and number 23 signed by the applicant in my presence.

Examined at Granite City, Ill., 9th day of April, 1928.

(Signed) Dr. G.B.M. Erwin, M.D.
Medical Examiner."

The benefit certificate provided that the policy should not be in force and effect until all of the requirements of the Association's laws had been fulfilled, the required assessments paid and the certificate signed by the Applicant in person during the Applicant's good health. The by-laws of the Association provided that"such beneficiary certificate shall not become effective until manually delivered to the applicant while the applicant is in good health and the assessment and dues for the month in which the certificate is delivered have been paid, and said beneficiary certif icate signed by the applicant while in good health."

The evidence as to the application of the insured for admission to the Association and for a beneficiary certificate, introduced by plaintiff, is in substance that the Security Benefit Association, Appellant, was a fraternal benefit Society, licensed to do business in Illinois, with local councils throughout the State, one of which was located at Granite City, Madison County. J.R. De Bow was District manager for the Association in that territory and his duties were to look after local councils, to personally interview each applicant, take the application and see that they were

examined, to deliver the policy in each case and collect the first premiums.

In the Spring of 1928 De Bow was conducting a drive for members. After the insured had been solicited by a lady canvasser, De Bow and Dr. Erwin drove out to her home to write up the application. Henry W. Niemann, the plaintiff's husband and beneficiary, testified that he and a Mrs. Fred Reiske were present when the application was filled out; that in answering the questions relative to the health of applicant, whether she had ever been rejected by another insurance company; whether she had been or was being treated by a doctor during the previous five years, and whether she had ever been an inmate of a hospital, the applicant, Mrs. Niemann, answered that she had been in Barnes Hospital about a year previous; that she was treated for kidney trouble by various doctors; that she was then under a doctor's care, and had just returned from visiting a doctor at Collinsville; that she had some medicine in her hands and further that her application for insurance had been rejected by the Lutheran Association; that as each question was asked and the answers above set forth given by her, Dr. Erwin wrote the answers in the application; that when the examination had been completed De Bow said, "Mrs. Niemann, you are doing your housework, ain't you?" And she told him, "Yes.", whereupon De Bow said, "That is fine!"; that after Dr. Erwin had filled out the application, the doctor told Mrs. Niemann to sign it and she did so, without reading it or having it read to her; that, thereupon, at the request of DeBow she paid to him the sum of $2.50; that several days later De Bow brought out Mrs. Niemann's policy and told her to keep it; that he did not say anything to her about what she should do with the policy. He said that was her policy and to keep it; that a further premium of $3.50 was paid to DeBow at that time, being premium for another month and DeBow gave her a receipt book.

At the bottom of the certificate there was a line for insured to sign on and to the left of this line was another line, above which appeared the word, "Witness." DeBow had already signed his name in this space as a witness. The certificate was never signed by Mrs. Niemann, the applicant.

Mrs. Reiske corroborated most of the testimony of Niemann as to what happened at the time of the taking of the application. This

testimony as to the acts of Mr. DeBow and Dr. Erwin is denied by them, almost in toto, but the question was fairly put to the jury and they apparently believed the plaintiff's witnesses.

In Atkinson v National Council of K & L of S. 193 App. 215, where the facts were quite similar to the situation here, the Court said on page 221, "It has become the general rule of law that an Insurance Company cannot dispute the truthfulness of false statements written in the application for insurance by its agent without fraud or collusion on the part of the applicant, even though such statements are expressly made warranties on the basis of which the policy is issued." And citing 25 Cyc 805; Provident Sav. Life Assur. Society v Cannon, 201 Ill. 260; Johnson v Royal Neighbors of America, 253 Ill. 570; Turner v M.W.of A., 186 App. 404. Quoting from the Turner case the Court said, "Under the rules of law prevailing in this State the regular examining physician of such a Society is the agent of the Society and the Society is bound by his acts within the scope of his authority, notwithstanding an express stipulation in the application that the applicant makes him his agent." In Guter v Security Benefit Ass'n, 335 Ill. 180, the Court said, "Notice to the agent at the time of the application for the insurance, of facts material to the risk, is notice to the insurer and will prevent it from insisting upon a forfeiture for causes within such agent's knowledge. The insurer is not permitted to insist that statements in an application are warranties, the falsity of which forfeits the policy, where such statements are those of the agent, put in by him in lieu of the facts disclosed to him by the insured."

There was no dispute about the authority of Dr. Erwin to act for the Appellant as its regular examining physician. We also think that J.R. ~~DeBow~~ DeBow must also be held to have acted as an agent of Appellant in what he did in the matter. The evidence tends to show that Appellant, through its agents, had knowledge of the physical condition of the insured at the time the certificate was issued, and at the time it was delivered to insured and afterwards when dues and assessments were collected.

Appellant has spent a great deal of time in its brief contending that the failure to sign the certificate and the condition of good health

on the date of delivery is a condition precedent, but the authorities cited do not decide the question of whether or not such condition could be waived. On this question Plaintiff offered proofs to show that De Bow collected $2.50 from the insured at the time the application was signed and upon inquiry by Mrs. Niemann as to whether or not she was then insured, he replied, "Yes sir, if you die to-night, Mrs. Niemann, your insurance is good." Also that upon delivery of the policy a few days later, his name appeared as a witness to her signature, and that when he handed the policy to her he told her to keep it and said, "Here's your policy, Mrs. Niemann, and I am ready to insure Henry." He did not say anything to her about what she should do with the policy. He said that was her policy and to "keep it." At the same time De Bow collected another month's premium on the policy, amounting to $3.35, and delivered a receipt book to the insured. DeBow testified that he always collected the first premium on the delivery of the policy and received the first six or eight months' premiums as his commission.

It is our opinion that under the evidence submitted in this case, it became a proper question for the jury to determine whether or not the conditions of the policy had been waived, and there was no preponderance in favor of Appellant that would warrant this Court in reversing the judgment on the ground that the verdict was contrary to the manifest weight of the evidence.

The Appellant complains of the refusal on the part of the Court to give three instructions offered by Appellant. No instructions were offered or given on the part of the Appellee, and the first instruction given on the part of Appellant told the jury that the plaintiff's claim that the ~~fact that deceased was not in good health was known to the defendant, is a material allegation and unless they believed~~ that defendant or its authorized agents had knowledge that the applicant was not in good health at the time of the delivery of the policy, the plaintiff could not recover.

The three instructions refused would have told the jury that if they believed from the evidence that the answers of the applicant, contained in the application, were not true and the defendant had no knowledge that said answers were untrue, then the plaintiff could not recover.

We believe it would have been proper for the Court to have so instructed the jury, but do not deem the refusal of the same to have been substantial error.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED

~~A. Tobin~~

~~The three instructions refused to~~

These instructions, ~~had~~ singled out and emphasized certain answers made by the applicant ~~in the application~~ to questions in the application, and while not specifically ~~C~~ourt by the first given instruction, the latter was sufficiently broad to instruct the jury as to the theory of appellants defense. We do not feel that the ~~question~~ refusal of said instructions was substantial error. Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

not to be reported in full

Mrs. Lee Wentzel in Paris

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JUN 9 1932

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1932.

TERM NO. 2.

AGENDA NO.1.

266 I.A. 625

FIRST NATIONAL BANK,
Appellant,

V.

WILLIAM SCHOOLEY, et al,
Appellees.

APPEAL FROM MADISON
CIRCUIT COURT.

BARRY, P. J:- Appellant sought to recover on a $5,000.00 note and there was a verdict and judgment for appellees. The original note, dated August 24, 1928, was renewed from time to time until June 23, 1930, the date of the note sued on. Appellees filed the general issue and special pleas. One of the special defenses relied upon is that appellant had loaned Bethel & Son, a corporation, $20,000.00 which was the legal limit that it was authorized to loan any one customer; that the State owed Bethel & Son about $35,000.00 which would not be paid until certain buildings were completed; that Bethel & Son had to procure another loan of $5,000.00 before it could complete the buildings; that appellant represented to appellees that an arrangement had been made whereby all checks due Bethel & Son would be sent to appellant and that if appellees would sign the note

for $5,000.00 payable to appellant it would pay the note out of the first funds received from the State; that large amounts, greatly in excess of $5,000.00, were received by appellant from the State but appellant failed to pay said note.

In 1928 Bethel & Son was engaged in the general contracting business and had under construction two buildings which were being erected for the State at Charleston and Kankakee. The corporation was then indebted to appellant in the sum of about $20,000.00 for money loaned which was the legal limit for any one customer. No more money could be drawn on the State contracts until the buildings were completed and all work and materials paid for. Appellant's president went to Springfield to investigate the matter and found that upon completion of the buildings there would be due Bethel & Son about $55,000.00. He arranged for all checks coming to Bethel & Son to be sent to appellant. Joseph Bethel, secretary of Bethel & Son, informed appellant that the corporation would have to procure a further loan of $5,000.00 in order to complete the buildings. Appellant's president said that appellant could not loan the corporation any more money as it had already loaned up to the legal limit; that it would be necessary for the corporation to procure the note of some other person and that the name of Bethel & Son could not appear thereon.

Mr. Bethel met appellee, William Schooley, and they went to the appellant bank and had a talk with its president. Mr. Bethel says he asked the president to tell Mr. Schooley what he had already learned at Springfield; that the president told Mr. Schooley that he had been to Springfield

and that the funds were coming to Bethel & Son but not immediately; that Schooley then asked the president: "If I sign this note will it be paid from the first funds received from the State?", and that the president replied: "Yes, I will take care of it." Mr. Schooley says that the president told him that Bethel & Son had borrowed $20,000.00 from appellant and could not get any more money on account of the bank examiner; that the State Department had agreed with the president that it would send the checks of Bethel & Son direct to appellant; that the president told him that if he would sign the $5,000.00 note as an accommodation note, when the money came in from the State jobs he would take up the note and there would be no obligation on the part of Schooley.

Appellant's president testified that he told Mr. Schooley in that conversation that he had learned from the State that there was about $30,000.00 due Bethel & Son but that no funds would be paid until the jobs were completed and all bills paid. He admits that all checks for Bethel & Son were to be sent to appellant. He denied that he told Schooley that if he would sign the note he would see that it was paid out of the funds coming from the State. Mr. Bethel says that his company completed the contracts and the money from the State, $35,000.00, was paid to Bethel & Son through the appellant bank. Appellant's president does not deny that said sum was paid to Bethel & Son through his bank. He simply says that appellant received no funds or money to be applied on the Schooley note. If the agreement testified to by Mr. Bethel and Mr. Schooley was made by appellant's president it became the duty of appellant to see that the note was paid out of the funds due Bethel & Son which came to its hands.

Appellant was vitally interested in seeing that the State

contracts were completed in order that it might get the money it had loaned Bethel & Son. It received its money but failed to see that the Schooley note was paid. In view of all the evidence it cannot be said that the contract testified to by Mr. Bethel and Mr. Schooley is so unreasonable as to be unworthy of belief. The jury necessarily found that the contract was made. If it was made and the funds passed through the appellant's hands it was its duty to use a portion thereof to pay the Schooley note. There is sufficient evidence in the record to support the verdict in that regard. Other questions are argued but as this one disposes of the case it is unnecessary to consider them.

The body of the note in question reads:- "Thirty days after date, for value received, we promise to pay to the order of the First National Bank, Granite City, Illinois, with interest at the rate of 7 per cent per annum, payable from date until paid." Unless it can be said that the "$5,000.00 " in the margin imports such a promise there is no promise to pay any amount. The record shows no blank in the note for the insertion of the amount. Even where there is a blank in the note for the insertion of the amount which has not been filled, it is said that the weight of authority is to the effect that until the blank is filled the instrument is incomplete, and no recovery can be had upon it. 3 R. C. L. 893; Hollen v. Davis, 59 Iowa, 444, 13 N. W. 413; Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 438; Love v. Perry, 90 S. E. (Ga.) 978; Norwich Bank v. Hyde, 13 Conn. 279. It is also held that there is no implied authority to insert anything where the note contains no blank. 3 R. C. L. 875.

TERM NO. 2.

It has been held that marginal figures are really no part of a note, but merely a memorandum of the amount. Riley v. Dickens, 19 Ill. 29; Merritt v. Boyden, & Son, 191 Ill. 136-152; People v. Lewinger, 252 Ill. 332-334. The question as to whether appellant could recover on the note, in any event, in the form in which it appears in the record has not been raised or argued and we are not expressing our opinion thereon. It is a question which may be presented to the Supreme Court. Becker v. Billings, 304 Ill. 190; Hazel v. Hoopeston-Danville Bus Co. 310 Ill. 38. The judgment is affirmed.

AFFIRMED.

Not to be reported in full.

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JUN 9 1932

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1932.

TERM NO. 7. AGENDA NO. 4.

266 I.A. 625

VIRLA HUDSON,
Appellee,

V.

LELAND W. HUDSON,
Appellant.

APPEAL FROM WILLIAMSON CIRCUIT COURT.

BARRY, P. J:- The parties were married November 11, 1918 and they have three children; Reba was born in December 1920, Margaret in December 1924 and Charles in September 1926. On December 7, 1929 appellee filed a bill for divorce on the ground of extreme and repeated cruelty. Appellant filed a cross-bill in which he charged her with adultery. On May 27, 1930 the Court entered a decree dismissing the original bill and granting appellant a divorce on his cross-bill. The Court found in its decree that appellee was guilty of adultery, since her marriage, with Leonard Thompson, Oscar Hatfield and various other lewd persons whose names are unknown, and the question as to the custody of the children was reserved until the next term of Court.

On July 18, 1930, the Court heard evidence and entered an order awarding the care and custody of the children to appellee, who, since the decree of divorce, had married

the said Oscar Hatfield. The decree provided that appellee should make a report to the Court every thirty days as to herself, the children and all things connected therewith. The Court found that at the time of the hearing appellee was working in a store and that she earned about $150.00 per month. Soon after the hearing she lost her position. She, her new husband and the children, left Herrin and went to Wood River where they lived for a short time with relatives of Hatfield. Later the family went to Bluffs City near Vandalia where appellee worked in a restaurant for some time, her husband being unemployed. From that place they moved to a farm two miles from Rochester, Illinois, and about 180 miles from Herrin.

After the children were awarded to appellee she made no report to the Court and for several months appellant tried in vain to ascertain her whereabouts and finally learned that the family was living near Rochester. He went to the school house in that town and inquired as to whether there were any children in school by the name of Hudson. The teacher investigated and reported that they had no children under that name. Appellant then inquired as to whether any Hatfield children were registered and he learned that his children were there under that name. He tried to talk to his own children and they told him they were not allowed to talk to him. He asked them where he could find their mother and brother and they said they were not allowed to talk to him. The teacher then asked the children the same and they replied that the mother lived on a farm with Mrs. Darneeden and gave directions as to how to get there.

Appellant then went to the Darneeden farm, met Hatfield and told him he would like to see his boy. They went to the home and as they approached the house Mrs. Darneeden and

appellant's boy came out on the porch. Mrs. Darneeden then told Hatfield that the school teacher had phoned that appellant had frightened the girls at school. Hatfield threatened to assault appellant and told him he could not come under the roof and the sister drew the child farther back on the porch. At that time Hatfield was employed by his brother-in-law Mr. Darneeden as a farm-hand. He and appellee and the three children were living in a tenant house on the farm two miles from school, but the children were taken to school every day. Hatfield was receiving $50.00 per month, had the use of a garden, a certain amount of meat and milk and the right to raise chickens.

Appellant filed a petition, January 10, 1931, asking the Court to modify the decree and to award to him the care and custody of the children. The record discloses that while appellant was in the Naval Aviation Corps during the World War he was injured in a wreck. On several occasions he had to go to veterns hospitals for treatment and in 1929 he was employed as an attendant at the hospital at Jefferson Barracks for about six months. He received $1300.00 from the goverment on account of partial disability and has been drawing a small monthly allowance. He turned the $1300.00 over to appellee prior to the divorce. When not in a hospital he worked in the Zeigler mines since 1925. Since eight or nine months prior to the granting of the divorce appellant has been earning about $150.00 per month and his health is much improved.

Appellant's mother is a widow and she testified that she is able and willing to live with her son and assist him in caring for the children. Appellee lost her position in the summer of 1930 soon after the original hearing on the question as to the care and custody of the children. Her

new husband has no money or property except such as he earns as a farm-hand as above stated. The Court refused to modify the decree as to the care and custody of the children.

The undisputed evidence is that for several months before the separation appellee had no love for appellant. The Court found that she had received attentions from other men and had committed adultery with many of them including her present husband. She married him within six weeks after the divorce was granted. The Court required her to make a report to the Court every thirty days as to herself and the children, but she ignored that requirement. She had two of the children in school under the name of Hatfield and had instructed the children that they were not allowed to talk to their father. Appellant traveled 350 miles to see his children and was denied that privilege through her efforts and those of Hatfield.

It clearly appears that appellee was unfaithful to her marriage vows; that she has no respect or regard for the rights of appellant, the father of her children; that the order of the Court means nothing to her. Under the evidence we think it is for the best interests of the children that their care and custody be awarded to their father. The order appealed from is reversed and the cause remanded with directions to award the care and custody of the three children to appellant with a provision that appellee shall be permitted to see them at reasonable times to be fixed by the Court. The Court will require appellant to keep the children within this State.

REVERSED AND REMANDED.

Not to be reported in full.

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Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1932.

TERM NO. 10.

AGENDA NO. 22.

266 I.A. 625

HAZEL BOST,
Defendant in Error.

V.

DAVID E. BOST,
Plaintiff in Error.

ERROR TO EAST ST. LOUIS CITY COURT.

BARRY, P. J:- The parties were divorced on April 6, 1929. Before the divorce was granted they entered into a written contract by the terms of which defendant in error was to have the care and custody of their child, and plaintiff in error was to pay to his wife $40.00 per month for the support of the child. He also agreed to carry a policy of insurance for $5,000.00 and the child was to be the beneficiary. Since the entry of the decree plaintiff in error paid to the mother of the child $40.00 per month for its support and he has paid $20.00 per month to keep the policy of insurance in force.

The child became seriously ill and an operation was performed. The expenses incident thereto were $210.00. On June 28, 1930 defendant in error filed a petition asking the Court to modify the decree to require plaintiff in error to

pay the medical and hospital bills to the amount of $210.00 and to require plaintiff in error to pay her a larger monthly allowance for the support and care of the child. The decree was modified, requiring plaintiff in error to pay one-half of the medical and hospital bills and the monthly allowance was increased to $50.00 per month.

At the time the decree of divorce was granted plaintiff in error was a Dentist at LeRoy, Illinois, and had a very good income, but since that time he moved to Galesburg, Illinois, in the hope that he could better his condition. As a result of that change in location his assets have been greatly reduced and his income is only about half of what it was before. He made a full and complete showing as to his income and financial condition and the evidence in that regard is undisputed. Under the evidence in the record the financial condition of the plaintiff in error would not warrant the modification of the decree. If his present income was the same as it was when the decree of divorce was entered we would not hestitate to affirm the decree. He is paying $60.00 per month for the benefit and support of the child and his present financial condition would not warrant a greater allowance. We do not wish to be understood as saying he should not be required to pay the medical and hospital bills in full. It clearly appears that he cannot make such payments at this time but if his income hereafter increases to a point that would justify a modification of the decree so as to require him to pay all of those bills, defendant in error shall be at liberty to make application therefor. The decree modifying the original decree is reversed and cause remanded with directions to leave the original decree in force.

REVERSED AND REMANDED.

Not to be reported.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED
JUN 9 1932
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

FEBRUARY TERM, A. D. 1932.

TERM NO. 21. AGENDA NO. 16.

266 I.A. 626

WILLIAM MATIEVICH,
Appellee,

V.

ILLINOIS TERMINAL CO.,
Appellant.

APPEAL FROM GRANITE CITY CITY COURT.

BARRY, P. J:- Appellee recovered a verdict and judgment for personal injuries sustained on May 5, 1930, when his car collided with a street car at the intersection of Madison Avenue and Nineteenth street in Granite City. Madison Avenue runs north and south and Nineteenth street runs west from the west side of said avenue. Madison Avenue is eighty feet wide with double street car tracks in the center. On either side of the double tracks is a concrete slab, twenty feet wide, for public travel, the east slab being for north bound and the west for south bound traffic. That part of the street between the slabs is paved with brick. The east street car is used by north bound and the west by south bound street cars.

Some street cars going north leave the east track on a

curved switch and go west upon the street car track on Nineteenth street. Some of the cars going south leave the west track on a curved switch and go west upon the Nineteenth street car track. The south switch begins to leave the east track on Madison Avenue sixty feet south of Nineteenth street, curves to the northwest, crosses the west track and enters the street car track on Nineteenth street some distance west of Madison Avenue. The north switch leaves the west track north of Nineteenth street, curves to the southwest and enters the street car track on Nineteenth street west of Madison Avenue on curves. Nineteenth street is paved, is thirty-five feet wide between curbs, and does not cross Madison Avenue.

On May 5, 1930 at about 7:40 A. M. appellee was driving a car south on the west slab on Madison Avenue and was crossing Nineteenth street. He says he was driving five or six feet from the west curb at about twenty miles per hour; that he had seen the street car coming north on Madison Avenue for a quarter of a block before it reached Nineteenth street; that when the street car started on the curve he was only a few feet from it and he applied his brakes, turned his car to the right and it was struck on the left hand side by the front end of the street car. He first testified that the collision occurred four or five feet west of the west track on Madison Avenue but later that it occurred two, three or four feet west of the west rail of the west track. One of his witnesses testified that appellee's car was struck on the right hand side. Another that the front end of the street car was in the center of the west track at the time of the collision. Another that the collision occurred west of the west track but later said that half of the auto was on the slab and the other half on the west track.

It will be remembered that it is twenty feet from the west rail of the west street car track to the west curb of Madison Avenue. The physical facts and the great weight of the testimony show that the front end of the street car was not west of the west rail of the west street car track at the time of the collision. A photograph taken within an hour after the collision, shows that the shattered glass caused by the collision was on either side of the west rail of the west track. If appellee was driving five or six feet from the west curb the collision could not have occurred as there would be a distance of at least eight feet between his car and the street car. Appellee says that when the street car started on the curve he was only a few feet from it, that he applied his brakes, turned his car to the right and it was struck on the left hand side by the front end of the street car. The curve started sixty feet south of Nineteenth street. A photograph taken within an hour after the collision shows that appellee's car was struck on the right hand corner of the front end. The motorman on the street car and other witnesses, testified that the street car came to a stop before the front end had passed west of the west rail of the west track. And that appellee turned his car to the left and struck the street car. Appellee first testified that he turned his car to the left, but later said he turned to the right; that he did not turn further to the right because there is a post on the Parkway next to the sidewalk inside of the curb. When both cars were observed immediately after the collision, appellee's car was astride of the west rail of the west track and the front end of the street car was just about to the said west rail. There was ample room for appellee to have turned his car to the right and there is no escape from the conclusion that if he had done

so the collision would not have occurred.

There is evidence to the effect that appellee was driving thirty to thirty-five miles per hour when he passed the trucks north of Nineteenth street. Just after the collision when both cars were at rest, one of those trucks passed them on the west side on the slab. It looks very much as if appellee became excited and suddenly pulled his car to the left instead of going straight ahead or turning to the right and in either case he had ample room to pass without danger to anyone. The verdict is manifestly against the weight of the evidence. The judgment is reversed and the cause remanded.

Reversed and Remanded.

Not to be reported in full.

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JUN 9 1932

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1932.

TERM NO. 25. AGENDA NO. 10.

266 I.A. 626

RAYMOND LAGRONE,
Appellee,

V.

FRANK H. STRATMANN,
Appellant.

APPEAL FROM EAST ST. LOUIS CITY COURT.

BARRY, P. J:- Appellee recovered a verdict and judgment for $1500.00 against appellant for injuries received in a collision at the intersection of Missouri Avenue and 13th street in East St. Louis. Missouri Avenue runs east and west, is a preferential street and is crossed by 13th street. Appellee was riding in a truck which was going west on Missouri Avenue. Appellant was driving a car north on 13th street. There was a conflict in the evidence as to whether appellant stopped his car before entering the intersection. Whether he was guilty of negligence in that regard was a question of fact for the jury and in the state of the proof we would not be warranted in disturbing the verdict on that question.

The Court did not err in allowing the attending physician to demonstrate to the jury the condition of appellee's arm.

TERM NO. 25.

Appellant assigned no error to the effect that the verdict is excessive. The Court did not err in instructing the jury that under the City Ordinance Missouri Avenue is a preferential street, that all motor vehicles should come to a full stop before entering the intersection in question, and that it was the duty of appellant to bring his car to a full stop before he entered the intersection. There was no error in the giving of appellee's second instruction. Peters v. C. U. T. Co., 231 Ill. 324. No reversible error having been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported in full.

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JUN 9 1932
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1932.

TERM NO. 32. AGENDA NO. 25.

266 I.A. 626

MABEL BYRON,
Appellee,

V.

ANTHONY TODOROFF,
Appellant.

APPEAL FROM ST. CLAIR CIRCUIT COURT.

BARRY, P. J:- Appellee recovered a verdict and judgment for $3,000.00 for an illness alleged to have been caused by eating salmon which was sold by appellant to appellee's mother. Appellee lived with her parents and a brother. In the first count of her declaration she charged that on April 17, 1930 her mother bought a can of salmon from appellant for the use of the family; that when sold the salmon contained poisonous and deleterious ingredients; that she ate a portion of the salmon and as a direct and proximate result of eating the same she became violently ill, etc. The second count charges that the salmon contained, in whole or in part, filthy, decomposed or putrid, infected, tainted or rotten animal substances, wholly unfit for human consumption; that she ate a portion of the salmon and as a

direct and proximate result thereof she became violently ill, etc. The third count charges that appellant impliedly warranted that the salmon was reasonably fit for human consumption; that it was wholly unfit for that purpose and as a result of eating a portion of the same she became violently ill, etc.

Appellee's mother purchased a can of salmon from appellant on April 17, 1930. She opened the can on the following morning and prepared sandwiches for appellee, her father and brother for their lunches on that day. At about eleven A. M. appellee ate about one-fourth of the sandwich prepared for her and she discovered nothing wrong with it. Her father ate all of his sandwich at about twelve O'clock and at about the same hour the brother took one bite of his sandwich and found it didn't taste right and he threw it away. Appellee and her father became ill at about one O'clock and the brother at about 3:30 P. M.

When appellee's mother opened the can and prepared the sandwiches she says there was no bulging of the can and that she discovered nothing by sight or smell to indicate that the salmon was not in good condition. The family doctor was called to see appellee and he arrived at the home at about five P. M. He didn't see any of the salmon and there was no chemical or bateriological analysis made of any portion of the can of salmon.

The doctor testified that in his opinion appellee's illness and that of her father and brother were caused by the salmon. His conclusion, however, is based entirely upon the fact that the three persons partook of the salmon and became ill at about the same time, and that the mother ate no portion of the salmon and was not sick. The doctor

further testified that appellee's condition might have been caused by something else that she ate that day; that the condition in which he found her could have been caused by something else she ate prior to that day; that poisons sometimes do not affect the patient the same day; that it is possible that her illness might have been caused by something she had eaten the day before.

In the state of the record the doctor's opinion as to the cause of appellee's illness was wholly conjectural. Bowman v. Woodway Stores, 345 Ill. 110. In that case it was contended that a child's death was caused by the use of evaporated milk which was contaminated. It appeared from the evidence that the father and mother of the child also partook of milk from the same can and they became ill. The Supreme Court held that there was not sufficient evidence to prove a cause of action and that the trial court erred in refusing to direct a verdict for the defendant. The evidence in the case at bar is equally insufficient to prove a cause of action. The judgment is reversed.

REVERSED.

The Clerk will insert in the judgment the following: "The Court finds that appellee failed to prove any count of her declaration."

Not to be reported in full.

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JUN 9 1932

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, 1932.

TERM NO. 8. AGENDA NO. 15.

266 I.A. 626

THE PEOPLE OF THE STATE OF ILLINOIS.
Defendants in Error,

vs.

MILLARD BOWERS,
Plaintiff in Error.

EROR TO COUNTY COURT OF SALINE COUNTY.

EDWARDS, J:- The State's Attorney of Saline County filed an Information in the County Court, charging plaintiff in error with unlawfully possessing intoxicating liquor for the purpose of sale. There was a trial by jury, a verdict of guilty as charged, and upon the finding he was sentenced by the court to committment to the State Farm at Vandalia for a period of six months, to pay the costs, and at the expiration of such six months period, if the costs remained unpaid, he should work out the same at the rate of $1.50 per day.

Previous to the trial the accused filed his motion to quash a complaint for search warrant, and also the search warrant issued pursuant thereto, and to suppress all evidence and impound all articles of liquor and containers, secured by reason of a search made under such warrant. There was a hearing upon the motion. Plaintiff in error

contends that the court denied the motion, and that the ruling was erroneous. The bill of exceptions sets forth the motion and supporting affidavit, and also the hearing upon same. It fails, however, to show that the court ruled upon the motion, or, if it did, what the ruling was.

In People v. Levin, 318 Ill., 227, where a similar motion was under consideration, the court held that motions of this nature are not parts of the common law record; that they can only become so when incorporated in a bill of exceptions, signed by the trial judge; that the motion to impound the liquors seized, and to exclude them from the evidence, and the court's rulings thereon, must be embodied in the bill of exceptions.

The law is further settled that it is not alone sufficient that the filing of the motion, and the hearing thereon, appear in the bill of exceptions, but in addition, it must be affirmatively shown therein that the court ruled upon such motion, and what the ruling was; and if there is a failure to show such ruling, no point is presented by the record, relative thereto, for consideration by the reviewing court. Burns et al. v. The People, 126 Ill., 285.

It is true that the clerk, in copying the common law record of the case, recites a denial of the motion. This is not sufficient, as the ruling must be set forth in the bill of exceptions. The People v. Faulkner, 248 Ill., 158. The People v. Lehner, 335 Ill., 431. Burns et al. v. The People, supra.

Upon this record, and under the rule of the authorities cited, there is nothing for this court to consider in connection with the motion to suppress and impound the liquor and containers referred to in the motion.

A motion for a new trial was filed, which challenged the sufficiency of the evidence to sustain the verdict and judgment. The bill of exceptions recites the filing of the

motion, but does not show what, if any, disposition the court made of the same. In People v. Leonardi, 338 Ill., 177, the Supreme Court stated: "In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict, it is necessary that the losing party make a motion for a new trial, and upon its being overruled, except to such ruling, and to include such motion, the order overruling the same, and exceptions thereto, together with the evidence, in the bill of exceptions." To the same effect is People v. Gabrys, 329 Ill., 102.

The bill of exceptions in the instant case fails to comply with such rule, in at least two particulars. It does not show the court's ruling upon the motion for a new trial, nor any exceptions thereto. It appears from the clerk's common law record that the motion was overruled; this, however, under the rule in People v. Faulkner, supra, and Call v. The People, 201 Ill., 499, was not sufficient to save the question for review.

There was a motion in arrest of judgment, assigning as grounds, the refusal of the court to grant a new trial, the denial of the motion to quash the complaint and search warrant; that plaintiff in error had no lawful trial; that the verdict was contrary to the law and the evidence, and the overruling of the motion to suppress and impound.

The motion in arrest of judgment only raised questions which appear upon the face of the record. People v. Depew, 237 Ill., 574. None of the reasons assigned in the motion, are within such rule, hence cannot be entertained. The record, as presented, saves no question for review, that is raised by the assignment of errors.

The judgment will be affirmed.

Judgment affirmed.

Not to be reported in full.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, 1932.

FILED
JUN 9 1932
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 14. AGENDA NO.21.

JOHN EDMONDS, et al.
Appellants,

VS.

W. D. GOURLEY,
Appellee.

266 I.A. 626

APPEAL FROM CIRCUIT COURT OF MASSAC COUNTY.

EDWARDS, J:- On April 25, 1927 Wm. Lynn recovered a judgment for $300.00 against appellants before a Police Magistrate of Massac County, a transcript of which judgment was filed in the office of the Clerk of the Circuit Court of said county on June 27, 1927.

On March 12, 1928, appellants entered into a contract with appellee for the exchange of certain parcels of real estate, by the terms of which appellee was to pay appellants the sum of $1500.00 as a difference in the exchange values, to be evidenced by two checks, each for $750.00, to order of appellants; one to be a down payment, and the other to be deposited at the Brookport National Bank, with W. H. Holifield, its president, until the title to appellants' land should be corrected. A few days later appellee sold the land, which he was acquiring in the trade, to Wm. Lynn, the

holder of said judgment, for the sum of $3,600.00. Lynn having an apparent lien of record, in the sum of $300.00, deducted such amount from the purchase price and assigned the judgment, in writing, to appellee, who caused the assignment to be recorded on June 29, 1928.

After this deal with Lynn, appellee met appellant, John Edmonds, at the bank. The testimony of both appellee and Holifield is that the former then told Edmonds that he had been required to pay the amount of such judgment; that he would leave a check at the bank in the sum of $436.40, (being $750.00 less $313.60, the amount of said judgment and costs), payable to order of appellant John Edmonds, who could take such check at any time he desired, as the balance due on the trade. Edmonds did not that day accept the check, but later, on April 9, 1928, returned, took the check and cashed it.

Appellants, something over a year later, brought suit to the August, 1929, term of the circuit court, to cancel such judgment, as having been obtained fraudulently, making only lynn a party defendant to such action. Appellee, at the time, and for months prior thereto, had held title of record, as assignee of the judgment, yet was not joined as a defendant to the suit.

The Circuit Court entered its decree, cancelling the judgment as prayed for in the bill of complaint, and appellants thereafter brought suit to recover the $313.60 which they contend is still due and unpaid on the land deal with appellee.

We think there was abundant proof in the record to justify the jury in finding, as they did, that when Edmonds received and accepted the check of appellee, on April 9, 1928, in the

holder of said judgment, for the sum of $3,600.00. Lynn having an apparent lien of record, in the sum of $300.00, deducted such amount from the purchase price and assigned the judgment, in writing, to appellee, who caused the assignment to be recorded on June 29, 1928.

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The Circuit Court entered its decree, cancelling the judgment as prayed for in the bill of complaint, and appellants thereafter brought suit to recover the $313.60 which they contend is still due and unpaid on the land deal with appellee.

We think there was abundant proof in the record to justify the jury in finding, as they did, that when Edmonds received and accepted the check of appellee, on April 9, 1928, in the

sum of $436.60, he did so understanding that it was tendered in full payment of the balance due on his trade with appellee, and that it discharged his claim against Gourley.

As reasons for reversing the judgment, appellants urge certain rulings of the court as to admission of evidence; also the giving and refusing of instructions.

Appellants contend the court erred in admitting, at the instance of appellee, the records and files of the proceedings before the Police Magistrate, relating to the $300.00 judgment.

It appears that appellant Edmonds, while on the stand, testified to all that happened concerning the rendition of such judgment, and that the evidence offered by appellee only tended to show the same facts, concerning which Edmonds had testified to fully. It is apparent such testimony could not have injured the appellants.

It is further insisted that the court erred in modifying the first instruction tendered by appellants, and that the instruction, as modified, was an incorrect statement of law. Counsel does not point out where or in what respect the instruction wrongly declares the law, but merely makes the general assertion that it was erroneous. Such argument does not present any question for the consideration of this court.

The trial court refused the third instruction of appellants, and its action is complained of. This instruction told the jury that if they believed from the evidence that the $300.00 judgment before the Police Magistrate, was void, it would be of no value in the case. It will be observed that the instruction left to the jury the determination of the validity of the judgment; in other words, to pass upon a question of law. This instruction was erroneous, and properly refused. The People, ex rel. v. Mayor of Alton, 193 Ill., 311. The

TERM NO. 14.

Empire State Surety Co. v. Schillinger Bros., 167 Ill. App., 632.

At the instance of appellee, the court charged the jury that no person is bound by a judgment or decree to which he is not made a party. It is claimed that this is not a correct statement of law, and that is the only criticism made. It seems to be well settled that no person, having an interest in the subject matter of the suit, and not made a party to the same, is bound by the judgment or decree rendered therein. Hopkins v. Roseclare Lead Co., 72 Ill., 373. Wachter v. Doerr, 210 Ill., 244. As an abstract legal statement, the instruction was not erroneous. Whether it is subject to other criticism, is not called into question by appellants, and we are only required to pass upon the objection actually urged.

Appellants make a general objection to all of appellee's given instructions, as follows: "Each and every one of them assume facts that are not in evidence. They in substance instruct the jury to find for the defendant upon the principle that a Justice of the Peace judgment is assignable, and that no matter what happens, it holds good against every person." This objection does not point out what facts, not in evidence, are assumed by any one instruction, nor did any one of them contain the principle complained of in the further criticism "that a Justice of the Peace judgment is assignable, and that no matter what happens, it holds good against every person."

Upon the record, we think that substantial justice has been done, and the judgment will be affirmed.

Judgment affirmed.

Not to be reported.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, 1932.

FILED
JUN 9 1932
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 19.

AGENDA NO. 9.

266 I.A. 627

KRIST KRISTOFF,
Appellant.

VS.

BILL KRISTOPOLUS,
Appellee.

APPEAL FROM COUNTY COURT OF MADISON COUNTY.

EDWARDS, J:- On September 11, 1923, appellant Kristoff loaned to appellee Kristopolus the sum of $150.00, taking the latter's promissory note therefor. Appellee, a foreigner, and apparently uneducated, executed the note by placing his mark thereon, which was witnessed by one August Droll. Appellant brought suit on the note before a Justice of the Peace of Madison County. An appeal was taken to the County Court, where a trial was had before a jury, who found the issues for appellee. The court entered judgment on the verdict, and this further appeal has been prosecuted.

The defense was payment. Appellant testified that two annual interest payments had been made on the note, and nothing else. Appellee's testimony was that he had fully

paid the note, principal and interest, in payments of varying amounts, at different times; among others, by a check for $21.95 which he had received from the Laclede Steel Company, and which on the back bore the indorsement of appellant, showing that he had cashed the same.

There was further corroboration of appellee's statement regarding a $40.00 cash payment, by the testimony of Nick Strubel, who said that he was present and witnessed the act when appellee paid to appellant such sum of money. Appellee testified to further payments, sufficient to satisfy the note, and in addition that he requested appellant to return the note to him; that the latter stated it was in a bank at Troy; that he would procure same and surrender it to appellee. He also testified that on another occasion he made a similar request of appellant, and that the two prepared to go to Troy for the note, but were prevented from doing so, by a rain storm. Appellant, though a witness at the trial, did not deny any of the statements of appellee relative to his demands for the return of the note, or the contemplated trip to the bank at Troy to secure same, hence such testimony stands wholly undisputed.

It is admitted by appellant that appellee, at divers times, paid to him sums of money; he, however, contends such payments were made to apply on other deals having no relation to the note in question.

No instructions were tendered by either party, and the cause was submitted to the jury solely upon the evidence. It will be observed that the testimony bearing upon the question whether appellee's payments to appellant were upon the note in suit, or in application to some other transactions, was sharply conflicting. It is argued that the court erred in permitting appellee to testify he had made.

payments on the note. Appellant had testified that only two annual interest payments of $7.50 each had been made. It was competent for appellee to meet this, by proof to the contrary. No objection was made to form of questions or manner of proof. The ruling was not . . error.

Appellant further contends, using his own words: "Then, leaving the question of payment out of it, is payment right, even after maturity of the note under the conditions here shown under our Negotiable Instrument Act? For, is proof of payment not incompatible with Section 67 of that Act, showing when it is non-negotiable thereby?" No authority is cited, and we apprehend none can be found sustaining such proposition.

Objection is made to the testimony of the witness Strubel, that he saw appellee pay to appellant forty dollars in cash. The objection was: "there is no writing, and the witness simply says he saw some money there." This evidence tended to corroborate the statement of appellee, and was competent.

The last contention of appellant is stated to be: "No note should be arbitrarily held paid when given, because some one cares to claim it." The evidence presented a question of fact whether the note had been paid. The proof was conflicting; the jury who saw and heard the witnesses, found for appellee; the trial judge approved their finding. There is no prejudicial error in the record, and we are of the opinion that the verdict is not contrary to the weight of the evidence; hence a reviewing court should not disturb the finding. Henderson v. Tobey, 116 Ill. App., 540.

The judgment is affirmed.

Judgment affirmed.

Not to be reported in full.

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JUN 9 1932
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FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1932.

TERM NO. 30.

AGENDA NO. 24.

266 I.A. 627

MARIE KILGORE,
Appellee.

VS.

PROTECTIVE MUTUAL BENEFIT ASSOCIATION, ETC.
Appellant.

APPEAL FROM THE COUNTY COURT OF RANDOLPH COUNTY.

EDWARDS, J:- This appeal is prosecuted to reverse a judgment of the County Court of Randolph County, in favor of appellee and against appellant, in the sum of $800.00, in an action brought on a life insurance policy.

Exceptions were saved to the entry of judgment, and it's correctness is questioned by proper assignments of error.

Appellee has failed to file any statement, brief or argument, as required by the rule of this Court, accordingly the judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

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Peter P. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

FEBRUARY TERM, 1932.

TERM NO. 31. AGENDA NO. 18.

266 I.A. 627

ALLIS-CHALMERS MANUFACTURING COMPANY, a Corporation, Appellee.

VS

THE TOWN OF BLAIRSVILLE, Appellant.

APPEAL FROM CIRCUIT COURT OF WILLIAMSON COUNTY.

EDWARDS, J: - In February, 1930, the Town of Blairsville, in Williamson County, the appellant herein, purchased of O. B. Avery Company, a tractor for use on the highways of such town. The purchase price was the sum of $3,450.00, in payment for which appellant gave to the seller two anticipation tax warrants, each for the sum of $1,725.00, to order of the O. B. Avery Company. Each warrant stated upon its face that it was issued in anticipation of taxes already levied, and payable solely out of such taxes when collected. Later one of the warrants was assigned by O. B. Avery Company to the appellee, who brought suit thereon, and recovered a judgment in the sum of $1,817.30; which judgment it is sought to reverse by this appeal.

Trial by jury was waived, and the cause submitted to the

court for hearing and decision. The abstract shows that after hearing, there was an order of court finding the issues in favor of plaintiff, in the sum of $1,817.30, with interest; that a motion in arrest of judgment was made and overruled, and thereafter judgment entered upon the finding in favor of plaintiff, and an appeal then allowed to this court.

Appellee urges that the motion in arrest of judgment was in fact filed ten days after entry of judgment, and refers to the record in support of such assertion. A sufficient answer to this contention is that if appellee was of opinion that the abstract did not correctly or completely summarize the record in this respect, it had the privilege, as well as rested under the obligation, of furnishing a supplemental abstract, and if it failed to do so, cannot ask that the court expend the time and labor necessary to read the record. Merely complaining about the correctness of the abstract does not present any question for this court's action. Hand v. Waddell, et al., 167 Ill., 402.

Appellant contends that the declaration did not, upon its face, state a cause of action; that it could not support the judgment, and that the court erred in overruling the motion in arrest of judgment.

The statute under whose authority the warrant in question was issued, being Sec. 2 of Ch. 146-A, Cahill's Illinois Statutes of 1931, provides, among other things, that where there is not sufficient money in the treasury of a municipality to defray its ordinary and necessary expenses, it shall be lawful for the proper authorities to create a fund to meet such expenses, by issuing and disposing of warrants drawn against, and in anticipation of, taxes already levied by such authorities, to the extent of seventy-five per cent of

the total amount of such taxes so levied; and provides that such warrants shall show, upon their face, that they are payable solely from such taxes when collected, and not otherwise.

Where a liability, which it is sought to enforce, is created by statute, which requires that it shall depend upon the fulfillment of any terms, the performance of such terms is a condition precedent to the enforcement of such liability, and as such must be averred in the declaration, otherwise no cause of action is stated. Harty Bros. v. Polakow, 151 Ill. App., 199. Garvey v. Wesson, 258 Mass. 48, 154 N. E. R., 516. Touhey v. City of Decatur, 175 Ind., 98, 93 N. E. R., 540. Sommerville v. Board of Commissioners, 116 Nebr., 282, 221 N. W. R., 433.

It was accordingly essential that the declaration in the instant case should allege that taxes were already levied at the time the warrant was issued; that at such time the outstanding anticipation warrants issued against such tax, including the warrant sued on, did not exceed seventy-five per cent of the amount of such taxes so levied, and that, of such taxes, there had been collected an amount sufficient to pay such warrant.

The first and third counts of the declaration fail to aver any one of these essential elements. The second count does not allege that when the warrant in question was issued, the taxes had already been levied, nor that the total amount of anticipation warrants then outstanding, did not exceed seventy-five per cent of such tax so levied. The declaration, lacking such necessary averments, did not state a cause of action. Smith v. City of Chicago Heights, 141 Ill. App., 588.

In Bradley v. Federal Life Ins. Co., 216 Ill. App., 602, this court held: "A declaration which fails to state a cause of action, is insufficient to support a judgment."

Where a declaration is so defective as not to support a judgment, it is open to attack by motion in arrest of judgment, where the question of the sufficiency of the declaration is directly presented. Henning v. Sampsell, 236 Ill., 375.

The declaration in this case failed to state a cause of action, was therefore insufficient to support the judgment, and the court should have sustained the motion in arrest of judgment.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

OCTOBER TERM, 1931.

FILED
JUN 9 1932
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 44. AGENDA NO. 39.

266 I.A. 627

EARL D. AMSLER, RECEIVER, etc., Appellee,

VS.

ROBERT E. TATE, et al., Appellants.

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY.

EDWARDS, J:- On December 8, 1930, the Auditor of Public Accounts closed the Merchants State Bank of Centralia as insolvent. A receiver was appointed, and the affairs of the institution are now in course of liquidation. Appellee, as receiver, brought a suit in chancery against appellants, executors, and also against the legatees named in the last will of Joe W. Tate, deceased, to enforce the stockholders' liability against said estate, to the amount of the par value of shares of stock held by said decedent in such bank at various periods, during his lifetime.

A demurrer was filed to the bill, which was overruled, and defendants answered. There was a hearing before the Chancellor, after which a decree was entered in favor of appellee in the sum of $4,100.00, requiring appellants to pay such amount to appellee out of the assets of the Tate estate, in due course

of administration, and made the claim a first lien upon certain real estate devised to Ella M. Tate by the last will of said Joe W. Tate, deceased. The decree was rendered only against the executors,- appellants herein, and not against the legatees or devisees, and this appeal is by the executors alone.

The appellants contend that there was no competent proof offered by appellee on which to base the decree. The only testimony offered in behalf of the receiver, was that of A. E. Heiberg, an accountant, based upon figures and documents which he stated he and his assistants had prepared as auditors of the bank after it had been closed.

The witness testified that he had occasion to audit the records of the Merchants State Bank during January, 1931, and found that Joe W. Tate was the owner, at various periods, of shares of stock in the bank, and also, during such periods of ownership, the amount of liabilities of the institution. At the close of the direct examination, counsel for appellee stated that the original records were in court , subject to cross-examination by appellants if they desired. It does not appear that the latter either cross-examined from such records, or indicated a desire to do so.

None of the original records were offered in evidence, nor were any of them identified or authenticated in any way; nor were any of the documents, from which the auditor prepared his summary, and upon which his testimony was based, shown to have been the actual records of the bank, kept in the course of the business; nor were the entries therein contained, proven to have been true and correct. Appellants objected to the testimony, and moved to strike it from the record. The court, however, held to the contrary, and the ruling is assigned as error.

It is the contention of appellants that until the documents, books or papers, examined by the accountant, and upon which he founded his summary, are first shown to have been the records of the bank, and, as such, themselves admissible in evidence, the conclusions of the expert, based thereon, cannot be received as proof.

While the contents of books or papers, which are obtainable, cannot be proved by parol, the writing itself being the best evidence, if, however, the originals are writings so voluminous or bulky that they cannot be conveniently or practicably examined in court, and the fact in issue is to be deduced from the whole collection, the result, if susceptible of calculation, may be testified to by a competent witness, who has made an examination of the originals; the statement or result to be verified by the testimony of the witness making such examination, with the right reserved to the opposite party to examine before its admission in evidence; and where the original writings are available, the privilege of cross-examining the witness from such originals. People v. Sawhill, 299 Ill., 393.

The voluminous writings, which experts may examine, and then testify to the result of such examination, must themselves be competent as evidence, must be identified and authenticated as original records, and it must be further shown that the entries which they contain are correctly recorded. Le Roy State Bank v. Keenan's Bank, 337 Ill., 192.

In the instant case, none of the writings examined by the witness, and upon which he based his conclusions, were shown to be records of the Merchants State Bank, or correctly kept as such, by any witness having knowledge of the fact. Heiberg testified that he went to the banking offices and there examined its records. He did not state any fact from which

it might be inferred that he, before making the audit, was familiar with the records of the bank, nor that he knew any of the writings which he examined, were in truth what they purported to be, nor correctly kept as such. In fact it is fairly inferable that he was not acquainted with the same.

Heiberg was the only witness called by appellee, hence there is no testimony whatever bearing upon the identity, authenticity and correctness of the books and other writings examined by him, which would render them admissible in evidence. "Since the books were not shown to be competent evidence, the statement of the conclusions, reached by a consideration of them, was not competent evidence, and should not have been admitted." Le Roy State Bank v. Keenan's Bank, supra, at page 193.

For the reasons stated, the testimony of the accountant, as to his conclusions, was not competent, and the court should have sustained both appellants' objection to his admissibility, and the motion to strike it from the record. Without the testimony of Heiberg, there is no evidence tending to show that Joe W. Tate, in his lifetime, or, after him, his estate, was liable as charged in the bill of complaint.

The decree is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

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JUN 9 1932
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1932.

TERM NO. 5. AGENDA NO. 14.

266 I.A. 627

Walter J. Schildroth,
Appellee

-VS-

Terminal Railroad Association of St. Louis,
Appellant.

APPEAL FROM CITY COURT OF EAST ST. LOUIS.

FULTON, J:- This is an appeal by Defendant from a judgment in the sum of $15,000.00 entered upon the verdict of a jury in an action on the case to recover damages under the Federal Employers' Liability Act on account of personal injuries received by Appellee at Madison, Illinois on May 13th, 1930.

The declaration consisted of two counts. The first count besides alleging facts necessary to bring the case under the federal act, charged appellant with the duty of exercising due care and caution for the safety of the appellee who was employed by appellant as a locomotive fireman and engine man; that disregarding such duty appellant negligently and carelessly moved certain cars over another track adjacent to the one on which appellee was working so as to cause the cars moved on the other track, to be thrown from the track on which they were running, over and against the engine up-

on which Appellee was working, thereby causing plaintiff to be struck and thrown to and against divers objects and in order to escape from said wreckage, the appellee jumped from said locomotive and was, as a result of said collision and as a result of jumping from said engine, seriously injured.

The second count is substantially the same as the first count except that the negligence charged is that the appellant negligently and carelessly moved certain cars along the track adjacent to the track where Appellee was working, with such great force and violence as to cause said other cars to strike and collide with certain cars standing upon the adjacent track and to then and there knock and move the cars from said adjacent track to and against the locomotive engine upon which plaintiff was working. The Appellant filed its plea of not guilty to the declaration.

It is urged in behalf of Appellant that a verdict should have been directed, proper motions having been made both at the close of the Appellee's testimony and at the conclusion of all of the evidence, because the appellee failed to sustain the burden of proof required of him to prove the negligence charged in his declaration. Also that the verdict was excessive.

The accident in which appellee was injured happened in the switching yard of appellant at Madison. Among the other tracks were two tracks known as 46 and 47, located near the center of the yard, parallel to each other and about six or eight feet apart. Appellee was a fireman whose engine was on track 46 at the time of the accident. He was qualified as an engineer and was occupying the engineer's seat, which was on the west side of the engine and was running the engine. Track 47 was to the east of track 46

and both tracks ran north and south. Appellee's engine was standing still at the time of the accident and he was watching out of the cab window towards the south for signals from the other members of the train crew. Suddenly without any warning one of the cars standing on track 47 was struck by two other cars, also moving on track 47, with such force that it was knocked off the track and over against the side of the engine cab where Appellee was at work. After the crash, and in the confusion the Appellee jumped out of the cab and suffered divers injuries.

Frank Bernaix, a member of Appellee's crew, testified for the Appellee and stated that two cars of scrap iron came down on track 47 and hit a car standing there; they were travelling south and no locomotive was attached to them, and he saw no one riding on the two cars of scrap iron; that when the two cars of scrap iron hit the standing car, it knocked it off center into the side of Appellee's engine; that the standing car was an empty box car and it crashed into the side of the engine upon which Appellee was at work; that a steam pipe was broken in the locomotive and that he saw appellee jumping out of the cab and as he hit the ground.

Another witness for Appellee was Herbert Hamerbrink, a switchman employed by Appellant, who was a member of the switching crew working on track 47. He testified that shortly before the accident his crew shoved two coal cars loaded with scrap steel through the switch on to track 47; that one of the crew uncoupled the two cars of scrap from the locomotive and they then moved south over track 47 and that no one was riding on them to control their movements; that the two cars rolled into some cars standing on track 47 and

that he went down later and found the box car sticking into the east side of the cab of the engine upon which Appellee was working.

Appellee testified that he was on the engineer's seat on the west side of engine, headed south on track 46; that he could not see movement of cars on track 47; that as his engine was standing still waiting for signals, he heard an awful crash and the next thing the corner of the box car struck the side of the cab; that right afterwards the steam pipe busted and he jumped out of the window to escape the steam.

Appellant argues that the facts in evidence do not prove the allegations of the first count that the appellant negligently and carelessly moved the cars on track adjacent to track No. 46, so as to cause the accident; nor do they prove the allegation of the second count that the cars on track 47 were moved with great force and violence. Both parties agree that the decisions of the federal courts in cases under the Federal Employers' Liability Act are controlling in this case.

It is well established that if there is any competent testimony in the record which, standing alone, fairly sustains the allegations of the declaration, the verdict should stand and a motion to direct should be denied. In this case there is positive testimony to the effect that the two cars of scrap iron were switched in on track 47, released or uncoupled from the engine and moved down south on said track without anyone riding on them to control the movement of the cars; that these two cars struck an empty box car opposite appellee's engine and with such force as to drive the standing car off the track and into the side of the engine cab of the locomotive on an adjacent track six or eight feet distant;

that the crash caused a steam pipe to burst and scalding steam to escape inside the engine cab; that to avoid the escaping steam, appellee, as well as his engineer, jumped from the cab and appellee was injured. In our opinion there were sufficient facts proven to warrant the Court in submitting the question of the negligence of appellant to the jury and the Court properly denied the motion to direct a verdict.

Both the Illinois and Federal Courts have sustained verdicts in cases not unlike in principle the case under consideration.

Keefe vs C. B. & Q R. R. Co. 213 Ill. App. 187,
Choctaw, Oklahoma, Etc., R. R. Co. vs Mc Dade, 191 U. S. 64;
Devine, Admr. vs Delano, 272 Ill. 166.

It is further insisted that the verdict of the jury is excessive. A large amount of medical testimony was taken in behalf of both sides concerning the injuries to Appellee. It is fairly well agreed that Appellee suffered a severe sprain to his right ankle so that it was kept in a plaster cast for about five weeks, and that he claims the right foot is still swollen and in a weakened condition; that he suffered a fracture of the left wrist, but that the fracture at the time of the trial had united and was in fairly good condition; that he suffered an impacted fracture of the left oscalsis, or the left heel bone which had given him lots of trouble and prevented him from wearing a shoe at the time of the trial. The injury to the heel bone, or oscalsis, seemed to be the most serious injury suffered by Appellee. Appellee also claims an injury to his back in the sacroiliac region and claims that it was caused by the injury. He further claims a fracture and other injuries to the coccyx. Both these claims are strenuously disputed by the appellant and the medical testimony is absolutely in conflict as to what the X ray pictures disclose as to such injuries.

TERM NO. 5.

Appellee was a man thirty-eight years of age at the time of the accident and had been earning from $180.00 to $190.00 per month as a railroad fireman. At the time of the trial he was totally unfitted to resume his employment, but the medical testimony is in dispute as to the permanency of his disability.

After reading the voluminous testimony on the question of injuries, we are led to believe that the verdict of $15,000.00 is excessive, and for a larger amount than is warranted by a fair analysis of the evidence.

If, therefore, Appellee chooses to remit the difference within twenty days, the judgment will be affirmed for the sum of $10,000.00. Otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

Not to be reported in full.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED
JUN 9 1932
Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

FEBRUARY TERM A. D. 1932.

TERM NO. 12. AGENDA NO. 5.

266 I.A. 628

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

-vs-

ED. MERCER,
Plaintiff in Error.

ERROR TO THE CIRCUIT COURT OF MADISON COUNTY.

FULTON, J:- Plaintiff in error is the coroner of Madison County. He resides, and is engaged in the undertaking business, in Granite City.

On September 7, 1931, which was Labor Day, Henry G. Miller and Louis Bernrueter, two of the judges of the Third Judicial Circuit, were at the law offices of Harry Faulkner, a lawyer in Granite City. Judge Jesse R. Brown, the other Judge of said Circuit, had previously issued an injunction restraining the Sheriff, State's Attorney, et al, from interfering with the operation of the Madison Kennel Club, said to be a gambling place in Madison County.

The newspapers had given the subject a great deal of publicity and the meeting in Faulkner's office was for the purpose of discussing ways and means of stopping the unlaw-

ful acts of the Madison Kennel Club and those operating it. Mr. Faulkner called Plaintiff in Error on the telephone and told him that Judges Miller and Bernrueter were in his office and wanted to see him, to which Plaintiff in Error said, "What time?" Faulkner said, "It is about 10:30 now; you can get here about 11." Plaintiff in error replied, "I do not know. I will have to see about it." Faulkner then called Judge Miller to the telephone. Plaintiff in error and Judge Miller do not agree as to the exact conversation which followed. Judge Miller testified on the hearing that he stated to Plaintiff in error over the 'phone that Judge Bernrueter and he were at Faulkner's office and would like to have Plaintiff in error come down there for awhile, and that Plaintiff in error then asked Judge Miller, "What do you want to talk to me about?" And Judge Miller said, "We want to talk to you about the matter of law enforcement in Madison County. You can come down here,- a matter of a couple of blocks from your office, or we order you to be at Edwardsville at one O'clock", and that Plaintiff in error then said, "Oh, all right. I will come down."

The conversation as stated by Plaintiff in Error in his sworn answer and also in his oral testimony was as follows: Judge Miller said, "Will you come to Harry Faulkner's office?" And Plaintiff in error inquired, "What for?" And Judge Miller said, "We want to talk over the dog track", and Plaintiff in error said, "All right."

Plaintiff in error did not put in an appearance at Faulkner's office, nor did he appear at Edwardsville at one O'clock but left Granite City for Quincy, where he went to attend a suit for damages against his son in the Federal Court, growing out of an automobile accident.

No court was in session the morning of September 7th;

no Venire, Writ or Process of any character had been issued by either of the Judges, nor had any been delivered to Plaintiff in error. Neither of said Judges informed Plaintiff in error of any intention to issue any venire, writ or process, nor was he requested at any time to serve any.

On October 27, 1931, C. C. Ellison, as Special State's Attorney for Madison County, filed a petition in behalf of the People against the Plaintiff in error to show cause why he should not be punished for contempt. Plaintiff in error filed a motion and affidavit for change of venue, which was denied, and then filed a motion to dismiss the petition, which was also denied. He then filed a verified answer.

On November 6th, 1931 the Plaintiff in error appeared in court, and over his objection Judge Benrueter ordered him sworn and orally examined him; also called other witnesses to testify. Upon the conclusion of all the testimony Judge Benrueter adjudged defendant guilty of the contempt as charged in the petition and also found that the actions and demeanor of Plaintiff in error in court were in themselves contemptuous.

On November 10th a written order was signed finding that plaintiff in error, in his answer, did not purge himself of the contempt set forth in the petition and further finding that the actions and demeanor of Plaintiff in error in court on November 6th were contemptuous.

Plaintiff in error has argued many errors to the action of the Trial Court, only one of which we believe necessary to the determination of this writ of error. The Petition attempts to charge a criminal contempt. In the case of the People v. Rongetti, 344 Ill. 107, the Court cites the following cases, with approval:

"In cases of direct contempt, that is contempt committed

in open court, the only record required to be made up is the order of the Court finding the contempt to have been committed and fixing the punishment therefor, which order should set out the facts constituting the offense, so fully and certainly as to show that the Court was authorized to make the order. People v. Hogan, 256 Ill. 496. In a case where the proceeding for contempt is for acts committed out of the presence of the Court and not in furtherance of a remedy sought in a suit or in enforcement of the orders or decrees of the Court, but to maintain the authority of the Court and uphold the administration of justice, if the person accused should answer under oath denying the alleged wrongful acts, his answer is conclusive and he is entitled to his discharge. People v. McDonald 314 Ill. 548, People v Seymour 272 Ill. 295. If the answer prove false the remedy is by indictment for perjury. Hake v People 230 Ill. 174".

In our judgment many of the acts charged to Plaintiff in error were committed out of the presence of the Court, and the sworn answer of Plaintiff in error was duly filed. In such case the Plaintiff in error should have been tried upon his answer alone. No other evidence may be heard. The answer must be taken as true and if sufficient to purge the Plaintiff in error of the contempt, he is entitled to be discharged. People v McLaughlin 334 Ill. 354.

In this case the Court not only examined Plaintiff in error orally but called other witnesses and examined them for the purpose of determining the truth of the facts set forth in the answer. The order found that the actions and demeanor of the Plaintiff in error in court on November 6th, 1931 were of themselves contemptuous in their nature, without setting out the facts constituting the offense.

Under the circumstances in this case, the Court was not justified in following the course of procedure shown by the record, and the Plaintiff in error, having by his answer, denied all the acts charged against him and all wrongful intent in his conversation with Judge Miller and actions with reference thereto, was entitled to be discharged. The order is reversed.

ORDER REVERSED.

Not to be reported.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED
JUN 9
Robert B Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

FEBRUARY TERM A. D. 1932.

TERM NO. 24.

AGENDA NO. 17.

266 I.A. 628

G. H. JACOBS,
Appellant.

VS

W. G. FRANK, LEE A. FRIEND and O. B. HASSLER, partners, doing business as Friend & Hassler,
Appellees.

APPEAL FROM CIRCUIT COURT OF WASHINGTON COUNTY.

FULTON, J:- An action of Assumpsit was instituted by Appellant against Appellees in the Circuit Court of Washington County to recover the balance due for the assignment and transfer of coal options underlying certain real estate.

Appellant filed an original declaration, and after Appellees had filed a plea of general issue and a special plea of the Statute of Limitations, appellant by leave of Court filed an amended declaration. Demurrers of the several appellants were sustained to the amended declaration. Plaintiff then through leave of Court filed a second amended declaration which is the declaration under consideration in this appeal. To the second amended declaration Appellee, W. G. Frank, filed his separate general and special demurrer.

Appellees, Friend & Hassler also filed their joint but similar general and special demurrer to the seconded amended declaration.

The demurrers were sustained by the Court, and appellant electing to abide by his declaration, judgment was rendered against him in bar of the action for costs. To reverse said judgment, this appeal is prosecuted.

The seconded amended declaration consists of four counts. Appellant contends that the first count is an ordinary count in indebitatus assumpsit. It sets forth that on July 26, 1921 Appellees were indebted to Appellant in the sum of $23,405.02 for the purchase price of certain coal options sold and delivered by Appellant to the Appellees and being so indebted the said Appellees promised in writing to pay Appellant on December 1, 1921 the said sum of $23,405.02, with interest. Appellees contend that the assignment and transfer of coal options constitute a contract relating to the conveyance of real estate and must be in writing in order to be binding upon the parties; that therefore, it was necessary in order to state a cause of action to plead the contract in full or by stating its terms. We do not think the point is well taken.

Where in an action of assumpsit upon a contract, there remains nothing to be done by the plaintiff, the contract being an executed one, and the consideration alone remaining unpaid, the plaintiff may declare generally in indebitatus assumpsit. Foster vs Mc Keown 192 Ill. 339.
Concord Apartment House Co. vs O'Brien 228 Ill. 360.

A somewhat similar case on facts is Landon v. Morehead 126 Pac. 1027. In that case the Court held a like contract was not affected by the Statute of Frauds because the consideration alone remained unpaid.

The second count declares upon a written instrument, alleg-

ed to have been executed by the defendants and the plaintiff, which agreement is set out in full. The Appellant insists that the agreement set forth in the count is in the nature of an account stated. The instrument purports to be a statement of money due Appellant from "Friend & Hassler, representatives of W. G. Frank, for assignment and delivery of coal options delivered to date. A specific list of the options assigned and delivered then follows, setting out the options, the acreage and the price to be paid for each. The total amount for such assignment of options amounted to $24,405.02, upon which the instrument shows $1000.00 had been paid The receipt for this payment runs to Friend and Hassler, representatives of W. G. Frank. The instrument is signed by "Friend and Hassler, representative of W. G. Frank, per Lee A. Friend."

A declaration must contain a full and explicit statement of the material facts upon which a recovery is sought. There is nothing in the contract contained in this count which in any way binds W. G. Frank. His name is not attached to the agreement, either in person or by his agent, and there is no positive allegation that it was executed in his behalf. We do not think the count sets forth a good cause of action against W. G. Frank.

The same objection applies to counts three and four. The conclusion of the pleader that the instrument is executed by the defendants is not sufficient, but some fact should be set forth in the counts from which the Court can determine that W. G. Frank is legally bound by the instruments pleaded.

For the reasons above set forth, this Court, believing the first count of the declaration to be sufficient, the trial Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

FILED
JUN 9 1932
Robert B Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FEBRUARY TERM, A. D. 1932.

TERM NO. 26.

AGENDA NO. 23.

266 I.A. 628

LOLA MAY EFFINGER,
Appellee.

VS

HENRY S. EFFINGER, JOSEPH C. EFFINGER, VAL L. EFFINGER, ALVIN C. EFFINGER, LIZZIE J. EFFINGER, ROSA G. FLYNN and LOUISE M. EFFINGER,
Appellants.

APPEAL FROM CITY COURT OF EAST ST. LOUIS.

FULTON, J:- This is an appeal from a decree entered by the City Court of East St. Louis wherein the Chancellor found the equities in favor of the Appellee who was complainant in the Bill, and in its decree provided for a permanent injunction restraining appellants from prosecuting suits to collect on notes against Appellee, and Appellant, Henry S. Effinger, from collecting a judgment rendered against appellee and for other relief.

Exception was duly made to the findings and decree of the Trial Court and the appellants prayed and perfected an appeal to this Court.

No statements, briefs or arguments have been filed by the Appellee in this court and the decree of the Trial Court

will therefore be reversed and the cause remanded to the City Court of East St. Louis Pro forma in accordance with the rule.

REVERSED AND REMANDED.

Not to be reported in full.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED
JUN 9 1932
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

OCTOBER TERM, A. D. 1931.

TERM NO. 39.

AGENDA NO. 44.

266 I.A. 628

STATES CORPORATION, a CORPORATION,
Appellant.

VS

SOUTHERN ILLINOIS and KENTUCKY RAILROAD COMPANY, a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF FRANKLIN COUNTY

FULTON, J:- An action in assumpsit was instituted by the Appellant against Appellee in the Circuit Court of Franklin County to recover damages alleged to have been suffered by Appellant because of a breach of railroad construction contract on the part of the Appellee.

The Appellant, States Corporation, was the contractor and will be referred to as the Plaintiff in this opinion. The Appellee, Southern Illinois and Kentucky Railroad Company, will be designated as the Defendant. After demurrers were sustained to the original and later amended declarations, the plaintiff filed amended additional counts of the declaration numbered XI to XXVI, inclusive, and was given leave to file a copy of contract sued on separately, which was done. Defendant thereupon filed its motion craving oyer of the

instrument sued on, which was granted by the Court, and by that order the contract was made a part of the amended additional counts numbered XI to XXVI, inclusive.

Defendant then filed its general and special demurrer to the amended additional counts, which was sustained, and Plaintiff electing to abide by its amended additional counts, judgment was rendered against it in bar of the action and for costs. To reverse said judgment this appeal is prosecuted.

The action of the Court, therefore, in sustaining the demurrer to the amended additional counts, which are the only ones in controversy on this appeal, is founded not only upon the allegations of the declaration in question, but, also upon the specific language of the contract brought before the Court by the demurrer.

Count XI alleges the Plaintiff is a Delaware corporation with its principal office in Chicago and Defendant is an Illinois corporation, and that on, to-wit: November 21, 1924 Plaintiff, at the request of the defendant agreed in the form of a written contract for the consideration therein expressed "to furnish the necessary tools, equipment, material and labor for all the work of clearing, grubbing and grading, including the loading hauling, unloading and placing of excavated material, also the loading, hauling, unloading and placing of all culvert pipe and drains, also the construction of concrete boxes and the furnishing and hauling of the necessary concrete material, also all the necessary grading for road crossings, ditches and stream diversions, for construction of roadbed and ditches for main track, side tracks and other tracks on Section 4, comprising line from Akin Junction to Big Four Crossing," of Defendant's railroad extending through the counties of Franklin and Williamson.

It is then alleged that the parties agreed that intercepting ditches would be made by Plaintiff at the tops of all earth cuttings where the ground fell toward the top of the slopes thereof to divert and drain waters away from the earth cuttings, and keep the cuttings in a dry, firm and workable condition, and further agreed that the cross-section and location of such ditches would be designated by Defendant's engineer and furnished by him in advance of the opening of said cuttings to be so drained by the ditches in question.

The count then alleges the further agreement by defendant that the appellee would acquire the lands necessary for the construction of said intercepting ditches thereon, in advance of the opening of all earth cuttings to be drained by said ditches.

The count then pleads formally the making of above agreements and then alleges that during the course of the performance of the work along defendant's line at certain locations, where there were three earth cuttings, one in Franklin and two in Williamson County, specifically located by station numbers, there were certain earth cuttings where the ground fell toward the top of the slopes thereof necessary to be made by the plaintiff in its performance of said work under its contract, and it thereupon became necessary for the defendant railroad company then and there to acquire lands upon which said intercepting ditches were to be made by the Plaintiff, and that it therefore became and was necessary for the defendant to cause its servant, said engineer, to designate the cross-section and location of said intercepting ditches, and for said engineer to make said designation.

The Count then alleges that the defendant, disregarding

its obligation and promise, did not acquire the necessary lands upon which these intercepting ditches were to be made, within the time aforesaid, as it had promised, to-wit: in advance of the opening of said earth cuttings, but on the contrary, the defendant did not acquire said lands until long afterwards, to-wit: after the opening of said earth cuttings.

The count then alleges that by reason of this failure, surface drainage in great quantities was not diverted and drained away from the earth cuttings, and large amounts of water flowed into them during the process of construction, and thereby the time, labor, material, equipment and expense of Plaintiff's work, under its agreement with defendant, were greatly increased over and above what would have been required if Defendant railroad had carried out its obligations; to the damage of the Plaintiff in the sum of $400,000.00.

The other amended and additional counts are very similar in substance and vary only slightly from Count XI.

In addition to the general causes of demurrer, defendant sets forth nineteen grounds for special demurrer. The first seven grounds of special demurrer in substance plead in varying language the general claim of defendant that there is a variance of the actual contract entered into between the parties and the legal effect thereof as alleged in the amended additional counts.

Grounds eight to seventeen, inclusive, sets forth that the contract in fact does not mean what the amended additional counts so allege. The eighteenth ground of demurrer sets forth that each of the counts is drawn on the theory that the intercepting ditches were to be provided for the benefit of plaintiff and constructed at a time when it would benefit the

plaintiff in doing the work called for by the contract, whereas the contract provides that the ditches should be constructed by Plaintiff for defendant and for defendant's benefit "and could be omitted if the defendant desired and if constructed, should be so constructed at a time to be determined by the engineer and not in advance of the opening of the cuttings unless required by him."

The Nineteenth ground is the claim by defendant that the variance alleged to exist between the contract on it face and the contract as pleaded in the amended additional counts, was an attempt to modify the contract by parol.

In its interpretation of the written contract, Plaintiff relies chiefly on Section 33 of the specifications, which reads: "33. Intercepting ditches shall be made at the top of the slopes of all earth cuttings where the ground falls toward the top of the slopes, and they must diverage sufficiently to prevent erosion of the adjoining embankment. The cross-section and location of such ditches will be designated by the engineer and, if required by him, shall be made in advance of opening the cutting." And also on Article 14 of the printed form of contract, which reads: "14. The Railroad Company will acquire the necessary lands upon which the Work under this contract is to be done, but the Railroad Company shall not be responsible to the Contractor for any delays occasioned by negotiation with land owners, or by process of condemnation. In case the Contractor shall be delayed in the performance of the Work by such delays, or on account of inability of the Railroad Company to secure such necessary lands, or from any unavoidable cause, the Contractor shall, on condition that written application to

said Engineer be made at the time such default or such cause becomes known to the contractor, or to the representative of the Contractor in charge of the Work, be granted such extension of time as said Engineer shall deem equitable and just, but only for such portions of the Work as may be affected by such delays."

Plaintiff urges that a reasonable interpretation of Section 33 of the specifications imposed upon the plaintiff the duty to construct intercepting ditches and left to plaintiff the right to decide when they should be built, provided only that plaintiff was obligated to build such ditches in advance of opening the cuts, if defendant's engineer should so direct.

Also that under the provisions of Article 14 of the contract, defendant agreed as a condition precedent to the performance by the plaintiff to furnish all land upon which the plaintiff was to perform the work required by the contract.

Plaintiff urges further that the language of the contract having been prepared solely by the defendant, must be strictly construed against it. Also that in addition to the facts set out in the pleadings the Court should take judicial notice of certain essential facts, such as the relations of the parties, the nature of the ground where this railroad right of way was to be built, its rugged character, the heavy rainfall occurring in this locality, the importance of handling the drainage in the conduct of work of that kind, and all other surrounding circumstances.

All of these contentions are argued in great detail in the briefs of both parties but the controversy narrows down to the question of whether or not defendant obligated itself, by the contract, to locate and cross-section the intercepting

ditches, and through its engineer furnish them to the plaintiff in advance of the opening of the earth cuttings to be drained by said ditches as alleged in each one of the amended, additional counts.

We have given consideration to points raised by plaintiff and have examined the contract and the specifications and are unable to say that there can be any liability on the defendant under the contract, because of a failure to have the intercepting ditches constructed and to procure the land therefor in advance of the opening of the cuttings. Indeed, to us the purport of the contract and the plain meaning of its terms indicate a contrary intention. We believe such an interpretation is not warranted unless the language of the clauses relied upon is materially changed.

The Courts must enforce the contracts as made by the parties. In the construction of contracts the intention of the parties, to be ascertained from the words employed, the connection in which they are used, and the subject matter in reference to which the parties are contracting must control, and Courts are powerless to interpolate terms and conditions into the contract to which the minds of the parties have not given assent. Hayes v O'Brien, 149 Ill. 403.

It is not unusual nor illegal for the parties to leave to the determination of the engineer the manner in which work shall be done, and the order of doing it, or to prescribe that the work shall be done under the direction and to the satisfaction of the engineer of the party having the work done.

It is a strained Construction and one that is not authorized by the terms of this contract to say that the defendant railroad company, or its engineer, is required or agrees to

locate and cross-section these intercepting ditches in advance of the opening of the cutting.

It is our opinion, therefore, that the position of Plaintiff on this contract is not well taken, and the legal effect of the contract, as pleaded in the amended additional counts is such a variance from the terms of the contract as to be subject to demurrer.

The judgment of the Circuit Court of Franklin County is therefore affirmed.

AFFIRMED.

Not to be reported in full.

Illinois Unpublished

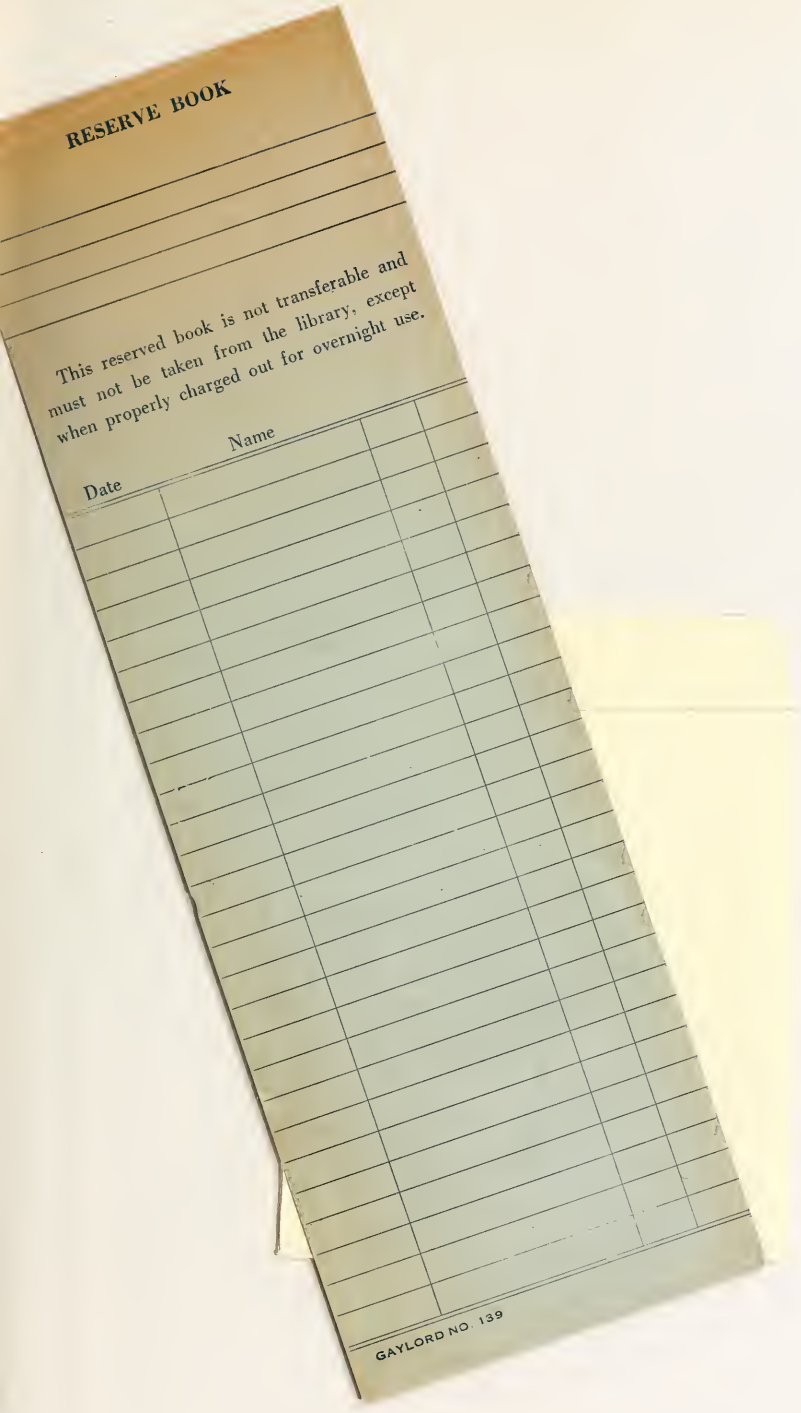
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